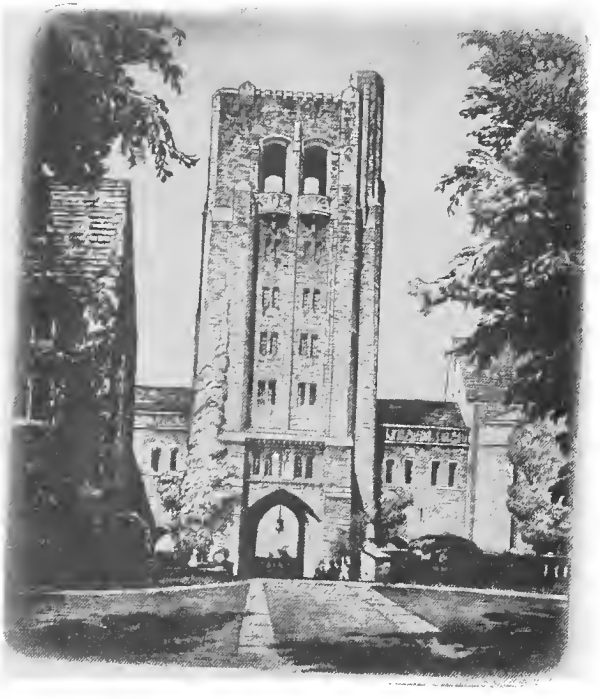
THE FEDERAL COURTS

THEIR ORGANIZATION JURISDICTION AND PROCEDURE



The Federal Courts.

THEIR ORGANIZATION, JURISDICTION AND PROCEDURE.

LECTURES BEFORE THE

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RICHMOND COLLEGE,

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BY

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THE FEDERAL COURTS.

The convention which framed the Constitution of the United States could not have completed its purpose, the formation of a more perfect union, without providing for a separate Federal judiciary. The instrument which they framed was a compact between sovereign States, who, parting with many of the attributes of sovereignty, bestowed these upon the government then established. Necessarily, in the course of time, questions would arise between these States and the general government, questions between the departments of the general government, questions also between the States themselves, which could not be submitted for solution to the judicial department of any one State. These questions could only be solved in tribunals created by the general government, whose decisions could bind all the States.

To the government created by the Constitution was entrusted the control and management of all relations with foreign governments. It had the sole power of making treaties, of declaring war, of concluding peace. These treaties binding upon all the States could not be construed by one State alone. Ambassadors accredited to the United States present their credentials to and could be recognized by the general government alone. Whilst residing near the government they would be under its protection and could seek redress for wrongs complained of at its hands, and would be responsible only to it for their action. It was bound to furnish tribunals which would consider cases affecting ambassadors, other public ministers and consuls. The Congress was invested with exclusive power to regulate commerce with foreign nations among the several States and with the Indian tribes. One of the principal objects of the convention was to take these subjects from individual

States and place them under the control of the general government. These regulations necessarily were to be construed and administered in tribunals established by Congress. The citizens of each State were entitled to all the privileges and immunities of citizens in the several States. Congress naturally was called upon to protect them in courts free from local prejudices and attachments. The whole country was homogenous in character and population. Intercourse between the several colonies had been free. New States would be formed out of the superabundant territory of the older States, and occasions would frequently arise in which lands claimed under grants of different States would be the subject of litigation. A tribunal above the suspicion of partisanship or partiality was necessary for the decision of these adverse claims. From time to time, increasing as intercourse with other nations increased, cases would arise between aliens and foreign States, and citizens of the United States, which if they could not be decided more impartially, would certainly be more free from apparent bias if heard in tribunals national in their character, not owing their existence to a single State. The United States would be constantly called upon to maintain its rights, compel the performance of its contracts, and enforce its penal and criminal laws in its own name. And every sovereign, for these purposes, establishes its own courts. Above all in a government maintained under a written constitution, with well defined powers, there would constantly arise in the acts of Congress and in the legislation of the several States, what are called Federal questions. These questions involve and are dependant upon the construction of the Constitution of the United States, and the laws passed thereunder. In their construction there is the supreme necessity for uniformity of decision. This could be secured only by the establishment of courts, whose decisions could be reviewed in one court of last resort, whose mandates would run and be implicitly obeyed throughout the whole union.

Recognizing this the convention adopted Article III. of the Constitution, vesting the judicial powers of the United States "in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

But whilst these courts are Federal courts, owing their sanction only to the Constitution and the action of the Congress thereunder, and are wholly independent of State authority, they are not in any sense foreign courts—see *Metcalf* v. *Watertown*, 153 U. S. 680—alien from the people of the States; nor are they imposed upon the States by any separate power. They are the courts of the people, as much so as any one of the State courts. They rest for their origin and authority upon the Constitution of the United States, adopted not by the votes of State legislatures, but by the people of the United States, voting directly thereon, ratified and confirmed by the people in convention assembled, and established in the only mode in which the whole people of the United States declare their will, the aggregate of concurrent majorities.

As was said by the great Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheaton, at page 403, after asserting that the Constitution as it came from the hands of the convention was a mere proposal, without obligation or pretensions to it; it had no vitality until affirmed by the people. He then says: "This mode of proceeding was adopted, and by the convention, by Congress and by the State legislatures, the instrument was submitted to the people. They acted on it in the only manner in which they can act safely, effectively and wisely on such a subject by assembling in convention. It is true they assembled in their several States; and where else could they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of confounding the American people into one common mass. Of consequence when they act, they act in their States. But the measures they adopt do not on that account cease to

be the measures of the people themselves." . . "The government of the Union, then, is emphatically a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be executed directly upon them for their benefit."

This language is affirmed by the Supreme Court *in re Debs*, 158 U. S. 578, and the language of Bradley, Justice, in *ex-parte Siebold*, 106 U. S. 371, quoted and approved. "We hold it to be an incontrovertible principle, that the government of the United States may by means of physical force, exercised through its official agents, execute on every foot of American soil the functions and powers that belong to it. This necessarily involves the power to command obedience to its laws and hence the power to keep the peace to that extent. This power to enforce its laws and execute its functions in all places, does not derogate from the power of the State to execute its laws at the same time and in the same place. The one does not exclude the other, except when both cannot be executed at the same time. In that case the words of the Constitution itself show which must yield. "This Constitution and all the laws which shall be made in pursuance thereof, shall be the supreme law of the land."

And in the administration of the law, the Federal courts within the several States comport themselves as courts of the State in which they are located. They are bound to recognize and follow the local laws and customs, all the rules of property prevailing in the States in which they are located, as these are authoritatively expounded by the State courts. In all that numerous class of cases in which the legal rights of citizens are involved, their contracts, holdings of property rights and duties growing out of the domestic relations, in short, all rights enforcible in a court of law, as contradistinguished from equity and admiralty, the Federal courts must adopt and closely follow the practice, pleadings, forms and modes of procedure of

the courts of the State in whose territory they are. In many cases the State courts and the Federal courts have concurrent jurisdiction. In these cases there are more or less dangers of conflict. Indeed, there is always danger of conflict between courts, although created by the same authority. But the Supreme Court of the United States rigidly enforces the rule preventing this conflict between Federal and State courts. Nowhere is this better expressed than in *Covell* v. *Heyman*, 111 U. S., 182. "The forbearance which courts of co-ordinate jurisdiction administered under a single system, and it may be added, under the same authority, exercise toward each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord. But between State courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent, and although they exist in the same space they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not on the same plane. And when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty."

The makers of the Constitution contented themselves with establishing one supreme court, that is to say, by declaring that there shall be only one supreme court. Mindful of the changes which time would bring and conscious, perhaps, of the inevitable growth of the great *empire* they were establishing, they left in the hands of Congress the power of accommodating to these changes and of meeting the necessities of the growing country by empowering them from time to time to ordain and establish inferior courts.

Immediately after the adoption of the Constitution the Congress proceeded to provide for the organization of the one Supreme Court, and to establish as the inferior courts the circuit and district courts, in what is known as the judiciary act, 24th September, 1789. 1 Statutes at Large, p. 73.

At first the Supreme Court consisted of a chief justice and five associate justices. The growth of the country has increased the number of associate justices to eight.

The whole country was divided into judicial districts, each State being within one district at least, and for each district a district court was established and a judge, known as the district judge, was appointed to preside over it. There are now sixty-nine districts. Several contiguous districts were united, forming a circuit. There are now nine circuits. For each circuit a court was established, known as the circuit court. The circuit court as first organized was composed of justices of the Supreme Court, afterwards of one circuit justice and the district judge. To this end the Supreme Court was directed to allot the several justices to the several circuits. If from any cause the circuit justice could not attend the circuit court or sit therein at any term, the district judge alone could hold the court. In the absence, inability or disability of the district judge, the circuit justice could hold the court alone.

In 1801 Congress created circuit judges—three for each circuit. This was done just as the administration of President John Adams was about to expire. He appointed all the judges and commissioned them on the eve of the inauguration of Mr. Jefferson, his successor. In the political slang of the day, these judges were known as "The Midnight Judges." This so exasperated the dominant political party, who had defeated him and had elected Mr. Jefferson, that the act was repealed and the office of circuit judge was abolished. The circuit courts thenceforward continued to be administered by the circuit justice and the district judge until 1869. One result of

the war between the States was to increase greatly the business of the courts of the United States and to render some increase in their judges necessary. In this last-mentioned year (14 Statutes at Large, 433) Congress provided for the creation of one judge for each circuit, to be known as the circuit judge. The circuit justice and circuit judge sat in the circuit court. In the absence of either or of both, the district judge could sit, and when he sat alone he had all the powers of the circuit court. The necessities of the court increasing, Congress in 1887 (24 Statutes at Large, 492) appointed an additional circuit judge for the second (the New York) circuit, and in 1891 (26 Statutes at Large, 826) provided for an additional circuit judge in every other circuit, both circuit judges having precisely the same powers, duties, responsibilities and emoluments. The pressure of business led to the appointment of still another (or third) circuit judge in the second (the New York) circuit, in the seventh circuit (Illinois, Indiana and Wisconsin), in the eighth circuit (embracing Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, the two Dakotas and Wyoming), and the ninth circuit also (embracing California, Oregon, Montana, Washington, Nevada, Idaho and Alaska).

In addition to these courts, Congress has established a Court of Claims, sitting at the seat of government, consisting of a chief justice and four judges. This court has jurisdiction of all claims brought against the United States on causes of action in contract. They have no jurisdiction over torts. Their decrees are rendered, and if against the United States, are reported to the Attorney-General of the United States, who brings them to the attention of Congress, by whom provision is made by special act for their payment. The District of Columbia being immediately and exclusively under the government and control of the Congress, a regular system of courts has been provided for that district. These, however, do not come within the scope of our present study.

Beside these are the territorial courts, appointed by Congress for each territory.

The judges of all the Federal courts are appointed by the President, "by and with the advice and consent of the Senate." All of these but the territorial judges hold their offices during good behavior, and are only removable by impeachment before and conviction by the Senate of the United States.

The territorial judges hold their office for a term of years and are removable by the President at his pleasure. R. S. 1877.

The business of the Supreme Court was of such magnitude, and was yearly increasing to such an extent, that Congress was compelled to come to its relief. To this end they established in each circuit a circuit court of appeals. This court consists of the circuit justice and all the circuit judges of the circuit, any two of them being a quorum for the hearing and decision of causes. In the absence, disability or inability of either the circuit justice or any of the circuit judges, a district judge of the circuit is called in to fill his place. To this end all the district judges are made members of the circuit court of appeals of their respective circuits. This court has an appellate jurisdiction which will be discussed and explained hereafter.

SO THEN WE HAVE:

The Supreme Court of the United States, established by the Constitution, and not subject to the action of Congress, except that Congress can increase or diminish the number of its justices, and in some respects limit its appellate jurisdiction.

Next—THE CIRCUIT COURT OF APPEALS.

THE CIRCUIT COURTS.

THE DISTRICT COURTS.

THE COURT OF CLAIMS.

THE COURTS IN THE DISTRICT OF COLUMBIA.

THE TERRITORIAL COURTS.

Over all of them but the Supreme Court, Congress has com-

plete control, in that it can limit and define their jurisdiction or abolish them at pleasure and create other courts.

It is proposed to take up each of these courts, and in a practical way, ascertain its jurisdiction and explain its procedure. The difficulty attending discussions of this character is that the subject grows so much under the discussion, that it is apt to run into wearisome length. On the other hand, the very nature of the subject forbids too great condensation. Principles are not the chief subject of our investigation. Facts, methods and details must be stated. Terseness which belongs to the discussion of principles, is apt to degenerate into obscurity. So the task is not free from difficulty. Its only purpose is instruction. An effort will be made to make that as complete as time and the subject will permit.

The various changes which have been made in the Federal law, its historical growth, if the expression can be used, will not be noticed unless this becomes necessary to a complete understanding of what the law now is. Nor will suggestions be made as to possible improvements which may appear necesnary or beneficial in existing laws. Before we enter upon an improvement of the law, we must thoroughly understand what the present law is. Our investigation will be confined to this. Our object is to make such an examination as to be able to say, with some degree of certainty, "*ita lex scripta est.*"

The Constitution, Article III., section 2, declares that "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public servants and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming

lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

The distribution and administration of this power among and by the courts of the United States is left to the discretion of the Congress, except in the case of the Supreme Court.

Before going into an examination of these courts and ascertaing their jurisdiction and procedure, it will be well to know how far the common law enters into the principles controlling them.

"It is clear," say the Supreme Court in *Wheaton et al.* v. *Peters* (8 Peters, at page 658), there can be no common law of the United States. The Federal Government is composed of sovereign and independent States. Each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution and laws of the Union. The common law could be made a part of our Federal system only by legislative adoption." But the framers of our Constitution had lived under the common law and possessed its principles as a part of their inheritance. Many of them were lawyers, educated under the system derived from England. Some of them had served their terms in the Inns of Court.

The language of the common law, its definitions and terms, were with them, household words. And when the Constitution uses these terms, they must be understood in the sense of the common law. "That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law." So said Mr. Justice Bradley in *Moore* v. *The United States*, 91 U. S., 274. And he applied this doctrine to the practice of the Court of Claims. This is an extraordinary court in which claims against the government are alone adjudicated. Yet in its

practice, so far as rules of evidence are concerned, it must follow the common law. In *Smith* v. *Alabama*, 124 U. S., 478, Mr. Justice Matthews, delivering the opinion of the Supreme Court, says: "There is no common law of the United States in the sense of a national customary law, distinct from the common law of England, as adopted by the several States each for itself, applied as its local law and subject to such alterations as may be provided by its own statutes."

So when we speak of the common law as applied by Federal courts, we mean the common law as it exists in each state. And as the common law may be abrogated or altered by statute, and every state has passed, or can pass statutes on this subject, the common law must vary as the States themselves. The Federal courts in each State apply the common law as it exists in such State. Mr. Justice Matthews, however, goes on: "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

"The code of constitutional and statutory construction which therefore is gradually formed by the judgment of its courts in the application of the Constitution and laws and treaties made in pursuance thereof, has, for its basis, so much of the common law as may be implied in the subject and constitutes a common law resting on national authority."

As the States have jurisdiction over all common law crimes, and as all crimes against the United States, are such as are the creation of statute, there are no common law crimes against the United States. But when the United States statutes forbid the commission of certain acts, and in such prohibition use common law terms, they must be defined according to common law principles.

With regard to this the Constitution declares: In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

In all the other cases before mentioned, set out in Article III., section 2 of the Constitution, quoted above, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. As we proceed hereafter to discuss the jurisdiction of the inferior courts, we will see what the exceptions and regulations are which the Congress has made.

This fixes the original jurisdiction of the Supreme Court, and the Congress has no power whatever to enlarge or modify it (*Marbury* v. *Madison*, 1 Cranch, 137; *Bollman* v. *Swartout*, 4 Cranch, 75, *ex-parte* Yerger, 8 Wall., 85). It will be noted that whilst the Constitution gives the Supreme Court original jurisdiction in these specified cases, it does not say whether it be exclusive. The judiciary act of 1789 (1 Statutes at Large 73) embodied in section 687 of the Revised Statutes of the United States, gives legislative construction to this article.

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature when a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants as a court of law can have consistently with the law of nations. An original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party."

To repeat: In all suits against ambassadors, other public

ministers, their domestics or domestic servants, consuls or vice-consuls, the Supreme Court has exclusive original jurisdiction. Such suits or proceedings can be brought in no other court. But in suits or proceedings brought by ambassadors, &c., the court has original jurisdiction, but not exclusive. Congress can provide that such suits can be heard in an inferior court.

It will be noted the qualification to this authority to hear suits against ambassadors, &c. They must be such "as a court of law can have consistently with the law of nations." The law of nations exempts public ministers from suits or prosecutions, and extends this exception to their families and servants.

So practically this jurisdiction is never exercised.

In controversies to which a State is a party—that is to say, controversies between two or more of the States of the Union, or between a State and a foreign State—the jurisdiction of the Supreme Court is original and exclusive.

But in controversies between a State and citizens of other States, and between a State and aliens, the jurisdiction is original, but not exclusive. In the original Constitution the language was without qualification, "In controversies to which a State is a party." In *Chisholm* v. *The State of Georgia*, 2 Dallas, 419, the Supreme Court took jurisdiction of a suit between a private person and a State and gave judgment. This created great popular excitement, leading to the adoption of a constitutional amendment.

Under the eleventh amendment to the Constitution no such suit will be entertained if the State is defendant. The controversy must be of a civil nature. The jurisdiction does not extend to cases for the recovery of a penalty for a violation of municipal law. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S, 265.

But the Supreme Court cannot take original jurisdiction of a controversy between a State and one of its own citizens (*Pennsylvania* v. *Quicksilver Co.*, 10 Wall., 553), notwithstand-

ing any expression in the section 687, Revised Statutes of the U. S., above quoted, as this is not warranted in the Constitution. You will find a full discussion and elucidation of this principle in *California* v. *So. Pac. Railway*, 157 U. S., 229, showing how far it is carried.

The phrase "controversies to which a State is a party," and the construction of the eleventh amendment to the Constitution, have long vexed the Supreme Court of the United States, and have been the subject of discussion in many cases. The language of the eleventh amendment is this:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Although the words of the amendment protect a State from suit by citizens of another State and aliens; they are held also to include suits by citizens of a State against their own State. The decision quoted from Wallace above has been confirmed in two well known cases, *Harris* v. *Louisiana*, 134 U. S. 1, and *Temple* v. *North Carolina*, in the same volume page 22. In these cases the point came up squarely and was decided by a unanimous court. Judge Harlan dissented on another ground. But when is the controversy one in which the State is a party, so that it comes within the inhibition of the amendment? There are many cases in the books in which suits are brought by private citizens against State officers, treasurers, auditors, governors, attorney-generals, in relation to taxes alleged to be unlawful, and many other matters of like character; and in them there has been much discussion and apparently varying decisions. It was at one time held, and by as great a judge as Chief Justice Marshall, that the State must be a party to the record by name, in order to make the controversy one in which the State was protected. *Osborn* v. *The Bank*, 9 Wheaton, 738. But this was overruled *in re Ayers*, 123 U. S. 443.

After many decisions the question came up in *Pennoyer* v. *McConnaughy*, 140 U. S. 9. The opinion of the court was delivered by Mr. Justice Lamar, whose specialty was constitutional law, and who had imbibed from childhood the strictest tenets of the State rights party.

The case was by a citizen of California against the Governor, Secretary of State, and Treasurer of the State of Oregon, who constituted ex-officio a board of land commissioners, seeking to enjoin them from selling, as property of the State, a large tract of land claimed by the complainant. You will observe that these three officers had no personal interest in these lands. They claimed that the lands belonged to the State of Oregon, and that they held the lands for the State, and it was contended that inasmuch as the decree would affect the title of the State she was really a party though not named as such. I will repeat the language of the court as the best possible exposition of the law on this delicate and doubtful question. "Is this suit in legal effect one against a State within the meaning of the eleventh amendment to the Constitution?" A very large number of cases involving a variety of questions arising under this amendment have been before this court for adjudication; and, as might naturally be expected, in view of the important interests and the wide-reaching political relations involved, the dissenting opinions have been numerous. Still, the general principles enunciated by these adjudications will, upon a review of the whole, be found to be such as the majority of the court and the dissentients are substantially agreed upon.

It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State without its consent, even if the sole object of such suit be to bring the State within the operation of the constitutional provision. "No State shall pass any law impairing the obligation of contracts." This immunity of a State from suit is

absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly it is equally well settled that a suit against the officers of a State to compel them to do the acts which constitute a performance by it of its contracts is in effect a suit against the State itself.

In the application of this latter principle two classes of cases have appeared in the decisions of the courts, and it is in determining to which class a particular case belongs that differing views have been presented.

The first class is when a suit is brought against the officers of the State as representing the State's action and liability, thus making the State, though not a party to the record, the real party against which the judgment will so operate as to compel the State to specifically perform its contracts. For this the learned Justice quotes cases, among them *in re Ayers*, 123 U. S., 443, in which the attorney-general of Virginia was concerned. You will notice that this class of cases require the officer of the State to do something—something the State ought to do. This class of cases come within the constitutional inhibition, being in effect suits against the State.

"The other class," continues Justice Lamar, "is when a suit is brought against defendants, who, claiming to act as officers of the State and under the color of an unconstitutional statute commit acts of wrong and injury to the rights and property of the plaintiff, acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State or for compensation in damages or in a proper case, when the remedy at law is inadequate for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce on the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the eleventh amendment an action against the State." You

will note that in this class of cases the defendant is sued for having done something, making a broad distinction between the two classes of cases, the one requiring a State officer to do something which the State should do, the other seeking redress for an act done by a State officer which he should not have done and has no valid protection for the doing.

Of course a State can be sued with its own consent.

There is a class of cases in which the courts of the United States take jurisdiction over a controversy to which a State is a party. This class of cases is when an officer of the revenue department, or one acting under the authority of such an officer, is indicted in a State court for some act done in pursuing his duties under the revenue act. For instance, if in attempting to arrest an offender, such officer, or the person acting under his authority, maims or kills such offender, and is indicted therefor in a State court. In this class of cases the person indicted can by petition have his case removed from the State court into the United States court and the trial had in the latter court. Rev. Stat. of the U. S., § 643. In every other respect the trial proceeds as it would have done in the State court. This will be mentioned hereafter. You will notice that this does not infringe against the eleventh amendment, as that forbids any suit commenced or prosecuted against any State. Here the prosecution is by the State. On this subject you can see *Tennessee* v. *Davis*, 100 U. S., 257.

It is very seldom that the original jurisdiction of the Supreme Court is invoked, except in controversies between States. Many of these are cited in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S., at page 288, and in the case of *California* v. *Southern Pacific R. R. Co.*, above quoted. The mode in which common law suits are brought in the Supreme Court is not definitely fixed. Rule 2 of that court considers the former practice of the courts of King's Bench and of chancery in England as affording outlines for its own practice. *Rhode Island* v. *Massachusetts*, 12

Peters, 657; *Georgia* v. *Grant*, 6 Wall., 341; *Florida* v. *Georgia*, 17 How., 478. But if the trial be on issues of fact in an action of law against a citizen of the United States, they must be submitted to a jury (section 689 of Revised Statutes). This is in accordance with the 7th amendment to the Constitution. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

So much for the original jurisdiction of the Supreme Court. This is but a small part of its usefulness. The great mass of its business is appellate and supervisory. It is the court of final resort upon all questions involving the construction of the Constitution and laws and treaties of the United States made thereunder. Its grand purpose is to protect the Constitution and to secure uniformity in its construction, and of the laws passed and treaties made thereunder. In the discussion of the appellate jurisdiction of the Supreme Court, we will confine ourselves for the present to its exercise over the circuit and district courts.

Formerly, and until the act of Congress, approved 3d March, 1891, 26 Statutes at Large, 826, establishing the circuit court of appeals, all final judgments in civil actions of any circuit court, or of a district court with circuit court powers, were reviewable by writ of error or by appeal in the Supreme Court, in which the matter in dispute, exclusive of costs, exceeded the sum of $2,000 at one time, and finally increased to $5,000. An appeal also lay from the district courts in prize cases, as of right, when the matter in dispute exceeded in value $2,000, and without reference to value on the certificate of the district judge, that the adjudication involved a question of general importance. In criminal cases in the circuit court, if the judges trying the case differed in opinion on questions occurring during or at the trial and certified up to the Supreme Court this difference, this court would

hear it on this certificate. Otherwise no appeal lay to the Supreme Court in criminal cases. But the business of the court became so immense that it could not be disposed of. The Congress came to the aid of the court in the establishment of the circuit court of appeals, and in that act modified somewhat the appellate jurisdiction of the Supreme Court.

Section 5th of that act provides: Appeals or writs of error may be taken from the district courts, or from the existing circuit courts, direct in the following cases:

1. In any case in which the jurisdiction of the court is in issue (that is of the circuit or district court which heard the case), and this without regard to the amount in dispute (*Mattingly* v. *N. W. Va. R. R.*, 158 U. S., 57), in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for its decision. This certificate must be granted during the term at which the judgment was entered (*Colvin* v. *Jacksonville*, 158 U. S., 456). The Supreme Court will not hear any discussion as to the facts or law bearing on the merits of the case.

2. From final sentences and decrees in prize cases; evidently without regard to value in dispute.

3. In cases of conviction of a capital or otherwise infamous crime. In *Mackin* v. *The United States*, 117 U. S., 348, affirmed *in re Claasen*, 140 U. S., 200. An infamous crime is one in which the judge has the power of sentencing the defendant, on conviction, to punishment in a penitentiary, with or without hard labor.

4. In any case that involves the construction or application of the Constitution of the United States.

5. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question.

6. In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

7. Nothing in that act contained can affect the jurisdiction of the Supreme Court to review the decisions of State courts of last resort. This will be treated separately.

The same act created in each circuit a circuit court of appeals, and gave it appellate jurisdiction to review by appeal or by writ of error, final decisions in the district and the existing circuit courts, in all cases other than those provided for as above in the Supreme Court. But the decisions of the circuit court of appeals on these writs of error or appeal are not all of them final. They are final in all the following cases.

1st. In which the jurisdiction is dependent upon the character of the parties. That is to say, where the jurisdiction is obtained by reason of the fact that the suit is between citizens of different States, or between citizens of the United States and aliens.

2d. In all cases arising under the patent laws.

3d. In all cases arising under the revenue laws, that is probably all civil cases.

4th. All cases arising under the criminal law. Clearly when the punishment is not capital or infamous, for such cases go to the Supreme Court.

5th. All cases under admiralty law.

If the decision of the circuit court of appeals is on any one of the cases in this category, it is final ; that is to say, the parties aggrieved by the decision cannot appeal from it or get a writ of error. But a quorum of the judges of the court of appeals, in any one of these cases, if they desire the instruction of the Supreme Court on any point or points in which they are in doubt, may certify to the Supreme Court the questions or propositions on which they desire instruction. *Columbus Watch Company* v. *Robbins*, 148 U. S., 269; *Cincinnati &c.*, v. *McKeen*, 149 U. S., 259. Thereupon the Supreme, Court may answer these questions so certified or may require the whole record and cause sent up to it for its consideration, and

thereupon decide the whole matter for itself as if it had been originally brought there. More than this, the Supreme Court may, by its own action in any one of the cases enumerated above, by *certiorari* or otherwise, direct the circuit court of appeals to certify the case up to the Supreme Court for its review and determination just as if it had gone there originally. This power should be exercised only in cases of gravity and importance. *Re Woods*, 143 U. S., 202. The only restriction upon it is that the judgment of the Circuit Court of Appeals was a final one. *Chicago, &c.*, v. *Osborne*, 146 U. S., 354. When a case has been heard and decided by the circuit court of appeals, not in any one of the classes enumerated above, then an appeal or writ of error will lie from the circuit court of appeals to the Supreme Court.

It will thus be perceived that the Supreme Court still has the right of review of every case heard and decided in the district or circuit courts, either by process in specified cases, directly to the Supreme Court itself, or by proceedings in the circuit court of appeals. Nor could the Congress have provided otherwise, for the Constitution had declared that there must be one Supreme Court.

II.

At the close of the remarks made to you when we met last, your attention was called to the fact that in the Supreme Court there has been preserved the right of review of every case heard and decided in any of the other Federal courts.

That this right of review extends as well to the decisions of the circuit court of appeals as to the other courts. And that this must be the case as the Constitution has ordained that there must be one Supreme Court.

For the purpose of obtaining this review by the Supreme Court, there are certain prerequisites. The judgment or decree must be final; that is to say, end the controversy, dispose of every matter in dispute. *Lodge* v. *Twell*, 135 U. S., 23.

If the case to be reviewed is one at law, involving what are technically known as legal principles, it can only be reviewed by writ of error. The jurisdiction cannot be secured except by writ of error. *Chase* v. *The United States*, 155 U. S. 489.

If it be an equity case, then it can only be reviewed on appeal.

A writ of error is a mandate emanating from the Supreme Court directed to the court (circuit or district) when its proceedings are complained of, commanding that court to send up so much of the record of the case as will enable the Supreme Court to understand the points complained of. It is allowed, either by a justice of the Supreme Court or by a judge of the court which tried the case, and is tested in the name of the Chief Justice of the United States, and may be signed either by the clerk of the Supreme Court or by the clerk of the court which tried the cause. (Section 1004 Revised Statutes.)

In order to be in a position to obtain this writ of error and thus prepare for adverse fortune, counsel must be alert during the whole progress of the cause to take and have noted each exception he may have to the ruling of the court on points made by him—that is, to points made on the pleadings, the admission or exclusion of evidence, refusal to charge the jury as requested, to the charge made to the jury. These exceptions must be taken and noted before the jury leave their box to consider the verdict. Each exception should be special—no general exception to the charge is allowed. It must not be a bald exception, but a reason must be given for it. Strictly these exceptions should be reduced to writing and presented to the court for signature as they are made, or at least during the trial. In practice they are made and noted during the trial, and formulated within a reasonable period afterward, during the term.

This having been provided for, the aggrieved party prepares his petition, which he can present to a Supreme Court justice

or to a judge of the court which tried his case, praying a writ of error. He accompanies his petition with the exceptions properly noted, certified by the signature, and properly, but not necessarily, the seal of the judge. He has two years after judgment within which to sue out his writ, if his appeal be to the Supreme Court, and six months if to the circuit court of appeals. He files also with his petition formal assignments of error, calling attention distinctly and tersely to the errors which he charges. The justice or judge to whom the petition is presented may grant it, usually does grant it, and requires the party complaining to enter into bond with surety. If it be desired to stay execution, or technically to obtain a supersedeas, the penalty of the bond is double the value of the matter in controversy, so as to secure the party who has gained the suit from loss. If a supersedeas be not desired, then the bond is only for the costs of the appeal. These preliminaries being finished, the justice or judge signs a citation—that is to say, a notice to the other party to be and appear in the Supreme Court or in the circuit court of appeals on a day named (within thirty days from the date of citation) and answer the writ. That citation is served through the marshal, or service is accepted. If there be several who conceive that they are injured, they must all have an opportunity to join in the application of the writ, and this must appear in the record. *Inglehart* v. *Stansbury*, 151 U. S., 68.

The writ of error having been issued with the citation, the clerk of the court below prepares the record, or so much thereof as may be necessary, and forwards it to the clerk of the Supreme Court. The plaintiff in error provides for the costs of that court. The clerk of the Supreme Court has the record printed and puts the case on that docket. When the cause is heard and decided the mandate of the Supreme Court goes down to the lower court, instructing it as to the disposition of the cause.

This is a matter of importance, and will bear recapitulation.

If a party to a suit at law desires a review of the action of the trial court he must take care to take exception to points ruled against him in the circuit court. In taking exception he must do so during the progress of the cause before the jury leave the box to consider the verdict. He must give reason for his exception and must see that the exception is noted. He may put his exception in form at the time it is made, but by leave of the court he may state and note the exceptions, and in a reasonable time fixed by the court may formulate them afterwards. This, however, unless specially provided, cannot be done after the term. The exceptions must not be general. They should be directed to a particular point. Reduced to writing, they must be signed and sealed by the trial judge, the sealing not being essential however. No exception not taken at the trial, and not so certified, will be considered in the Supreme Court. Having thus laid the foundation for his writ of error, the party aggrieved can take it up to the Supreme Court at any time within two years from entry of judgment. No writ of error can be had but to a final judgment ; and on a writ of error to a final judgment any error discovered and excepted to from the beginning of the cause can be reviewed. If he determine to go up to the Supreme Court, this party prepares a petition for a writ of error, addressed to the court which tried the cause. He produces with this the exceptions noted and certified, technically called the bill of exceptions, and also all the errors which he imputes to the court, called the assignment of errors. He also signs a bond with surety. If he simply wants a review of the case, his bond is in a sum only necessary to cover the costs of the appeal. If he wishes a stay of execution, technically called a supersedeas, his bond must be in such a sum as will cover as well the costs, as all damages the other party will suffer if the decision of the Supreme Court be in his favor. Moreover, to get this supersedeas he must furnish the bond and sue out his writ of error within sixty

days after entry of final judgment. This time may be enlarged by a justice of the Supreme Court (Revised Statutes, section 1007). In order that he may have time within which to make up his mind, an execution in the United States Court cannot issue until ten days after entry of judgment. The petition, exceptions, assignment of errors, and bond having been presented to the judge who tried the case, or to a justice of the Supreme Court, he allows the writ; thereupon a citation issues which is tested in the name of the chief justice of the United States, but may be sealed by the clerk of the court to which the writ is taken. Then a summons is issued called a citation, addressed to the opposite party, citing him to be and appear within thirty days from its date in the Supreme Court to answer the averments of the opposite party. The clerk of the court below then prepares the record, or so much as may be necessary for the proper understanding of the errors charged, and forwards it to the clerk of the Supreme Court. The party suing out the writ is the plaintiff in error, the other party is the defendant in error. The plaintiff in error makes provision for printing the record, which is done under the orders of the clerk of the Supreme Court. It is the duty of the plaintiff in error to see that the case is docketed and record filed on or before the return day of the writ named in the citation. This day may be extended, on cause shown, by the judge who signed the citation, or by any justice of the Supreme Court. If he fail so to docket his case, the defendant in error, on presenting a certificate of the clerk of the court below, to which the writ of error has been issued, that such writ was duly allowed, can have the cause docketed and dismissed. This he can do in vacation as well as term time. It is competent for the clerk to dismiss under these circumstances. A case so docketed and dismissed cannot again be docketed unless by an order of the Supreme Court.

If the judge who tried the case refuses to sign and seal a bill

of exceptions, or to grant the writ of error, or to give a supersedeas, all or any of these, the party seeking these, or any of them, can apply to the Supreme Court for a mandamus to be directed to him to show cause for his refusal.

If the clerk sends up an insufficient record or refuses to complete the record, application can also be made to the Supreme Court for a mandamus to him to complete the record.

So much for the writ of error. It is the only mode in which a law case can be carried to the Supreme Court; and is necessary to give that court jurisdiction in such cases. If there be other parties interested in the judgment, they must be parties to the writ, or the plaintiff in error must by the record show that by summons, or some equivalent proceeding, they have had an opportunity of joining in the writ and had refused or omitted to do so. The technical name for this is severance.

In criminal cases the same mode of carrying them up to the Supreme Court is followed as in those cases at law. The allowance of the appeal suspends the execution of the sentence, and the defendant, pending the action of the Supreme Court, may be discharged on bail or recognizance under the order of the judge signing the citation or any justice of the Supreme Court. *Hudson* v. *Parker*, 156 U. S. 277.

In cases not cases at law or criminal cases; that is to say, cases in equity or admiralty and the like, the action of the Supreme Court reviewing them is obtained by an appeal. The right to appeal is obtained in the same way, and is upon the same conditions as a writ of error, with this difference: No bill of exceptions is filed. In every other respect the practice is the same. The results of the two modes are not exactly the same. On hearing a case in error, the judgment of the court is either affirmed or set aside and a new trial granted On hearing a case on appeal, the decree below may be affirmed in the whole or in part only or modified or set aside in the whole or in part, and the cause, unless affirmed in the whole, is sent

back for further proceedings in conformity with the decree of the Supreme Court. There is another mode in which the Supreme Court exercises appellate jurisdiction over the circuit and district courts, limited, however, in its character. That is by the writ of habeas corpus. When one is in custody under the order of a district or of a circuit court of the United States, he can apply to the Supreme Court for a writ of habeas corpus. Under this writ he can be brought before the court and the cause of his detention inquired into. *Ex parte Siebold*, 100 U. S. 373, is an excellent case on this subject, and will reward perusal. The only question, however, which the Supreme Court on such an examination can consider is, whether the court making the order had jurisdiction of the cause in which it was made. It cannot pass upon any question involved in the merits of the case, or examine the opinion of the court to see if there was error. The writ of habeas corpus cannot be tortured into a writ of error. *In re Swan*, 150 U. S. 652. If the Supreme Court find that the court below had jurisdiction, the writ will be dismissed. *Ex parte Tyler*, 149 U. S. 164. If it was without jurisdiction, the prisoner will be discharged.

There is another branch of the appellate jurisdiction of the Supreme Court which deserves special consideration. It is the control which that court has over the decisions of what are known as Federal questions. Federal questions are such as arise under the Constitution of the United States, treaties and laws passed thereunder, involving their construction and the enforcement of rights thereunder. It is well expressed as the construction or application of the Constitution of the United States. This jurisdiction is exercised under the provisions now embodied in the section 709 Revised Statutes of the United States, in these words:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an

authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

"The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may at their discretion award execution or remand the same to the court from which it was removed by the writ."

This section has been very frequently before the Supreme Court, as can be seen from the mass of authorities quoted in connection with it in the edition of the Revised Statutes of 1878. The power herein given to the Supreme Court is very great. It enables it to control on all Federal questions the highest courts of the several States, and thereby secures that uniformity in the construction of Federal questions which must exist. It will be seen that to the exercise of this jurisdiction these formal conditions must exist in each case.

1. There must be a final judgment or decree. We will see when we examine into the jurisdiction of the circuit court provisions made for removal into the Federal courts of cases brought in the State courts before any judgment is rendered. But no case can be carried into the Supreme Court from a State court until final judgment or decree has been rendered.

A final judgment is one which ends the litigation between the parties in the State courts.

Chief-Justice Waite in his usual clear language thus defines the term in *Bostwick* v. *Brinkerhoff*, 16 Otto, 3: "The rule is well settled and of long standing that a judgment or decree to be final within the meaning of that term, as used in the acts of Congress giving jurisdiction to this court on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered. See, also, *Johnson* v. *Keith*, 117 U. S., 199; and Chief-Justice Fuller, in *Lodge* v. *Twell*, 135 U. S., 232, approving this definition, adds: "Where something more than the mere ministerial execution of the decree as rendered is left to be done, the decree is not final." An instance of this is when the costs are not taxed. *Wheeler* v. *Harris*, 10 Wall., 51.

2. It must be the judgment of a court of a State, not of a Territory, nor of the District of Columbia.

3. The judgment or decree must have been rendered in a suit. This term suit is defined by Chief Justice Marshall, in *Weston* v. *City Council*, 2 Peters, 449. "The term," says he, "is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of procedure may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision is sought is a suit." In that case the court below granted a writ of prohibition, and that was held a suit. So refusal to grant a writ of habeas corpus is a suit. *Palleser* v. *The United States*, 136 U. S., 255. What is called "in code pleading" as followed in New York and other States, a controversy without action, that is the submission of a question to the court on an agreed statement of facts, no

compulsory process having been issued, is a suit. (*Aldrich* v. *The Ætna Co.*, 8 Wall., 491.)

4. The judgment or decree must be that of the highest court of the State in which a judgment could be had even if that court be an inferior court in the State. (*Gregory* v. *McVeigh*, 90 U. S., 294.) If an appeal would lie from such inferior court to another court of the State by leave of the judge and he refuses to give such leave, the cause can go to the Supreme Court of the United States. The writ of error of the Supreme Court runs to the court having possession of the record, and which can certify it. As, for example, a cause is heard in a State court and is carried by appeal or writ of error to the Supreme Court of the State, which affirms the court below and remands the case to it. If a writ of error be sued out of the Supreme Court of the United States, it runs to the inferior court, as it possesses the record.

These formal conditions being satisfied, there must appear in the record of the judgment or decree, at least one Federal question which has been disposed of in a specified way.

1. There must have been drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision of the State court must have been against their validity, or

2. There must have been drawn in question, the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision is in favor of their validity.

3. Where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of or commission held, or authority exercised under the United States and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

There must have been "drawn in question." That is, the question under the Constitution, treaties or laws of the United States which we call the Federal question, must have been in issue, and its determination must have been necessary to the decision. For example, if a State were to pass an act which it is alleged impaired the obligation of a contract and so invalid, under section 10, Article I. of the Constitution, and the State court should decide that the contract set up was unlawful as claimed, the Supreme Court of the United States could not review the decision. Another illustration:

"Where two defences are made in the State court, either of which, if sustained, would bar the action, and one of them made a Federal question, the other did not. The State court sustained both. The Supreme Court would sustain the jurisdiction so far as to examine the case. If it came to the conclusion that the question, not Federal, was rightly decided, it would dismiss the case and not consider the Federal question at all. (*Hale* v. *Akers*, 132 U. S., 565.) It is not enough to give the Supreme Court jurisdiction over the judgment of a State court, for the record to show that a Federal question was argued or presented to that court for decision, although this, too, is essential. It must also show that the Federal question was passed upon by the court below.

It must also appear that the decision of this question was necessary to the determination of the cause, and that it was actually decided or that the judgment could not have been given without deciding it. *Moore* v. *Mississippi*, 21 Wall., 638. It will be noticed that to give the Supreme Court jurisdiction when the question is with regard to the Constitution, treaties, or laws of the United States, the decision of the State court must be against the validity. But when the question is as to the validity of a State constitution or statute, or acts done under authority of a statute, the decision must be in favor of the validity, else the Supreme Court has no jurisdiction.

The acts done under the authority of a statute embrace all ordinances of municipal corporations as well as acts of State legislatures. *Weston* v. *City Council*, 2 Peters, 463; *Home Ins. Co.* v. *City Council*, 93 U. S., 120.

With regard to the third class, above mentioned, titles, rights, privileges, and immunities, claimed under United States Constitution and laws, the rule is, when it appears that some title, right, privileges, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction; this is a case arising under the Constitution or laws of the United States. *Starn* v. *New York*, 115 U. S., 257.

Examples of these cases are as follows: A party sued in a State court claims that he has the right to remove it into the United States Court. If this right set up in the State court is denied, the Supreme Court of the United States can review the decision. *Chesapeake and Ohio R. R. Co.* v. *White*, 111 U. S. 137. The Constitution of the United States provides that no one can be deprived of his property without due process of law. This is an immunity which would give the Supreme Court jurisdiction. *U. S.* v. *Lee*, 106 U. S., 196. If a citizen of African descent is excluded from the jury by reason of his race, color, or previous condition, this would give the Supreme Court jurisdiction. *Neal* v. *Delaware*, 103 U. S. 385. Where legal tender notes were tendered for a judgment and tender refused, this will accomplish the same result. *Juillard* v. *Greenman*, 110 U. S. 421. Numerous cases of the same kind can be cited.

There are three things to be noted. First, the right of review of the decision of State courts by the Supreme Court of the United States, applies as well to criminal as to civil causes; second, although the 11th amendment forbids a suit against a State, this prohibition does not extend to the appellate jurisdiction. For a defendant in a State court prosecuted in the

name of the State, can have his case reviewed in the Supreme Court of the United States if all other conditions exist; third, the act of 1890 fixing the jurisdiction of the Supreme Court, does not say anything as to the limit in money value of its jurisdiction. Before that act no case could be carried by appeal from the circuit court, unless the matter in controversy exceeded $5,000 without including costs.

But inasmuch as the jurisdiction of the circuit court is limited, except in one or two respects, to cases in which the matter in controversy exceeds the sum of $2,000, beside interest and costs, and the jurisdiction of the district court has a similar, though not the same limitation, the jurisdiction of the Supreme Court in cases carried up from these courts is affected by the same limitations.

But no limit whatever exists in cases carried up from State courts into the Supreme Court.

In addition to the original and appellate jurisdiction of the Supreme Court, it is empowered by statute to issue writs of *scire facias*, and other writs; that is to say, prohibition, mandamus, *scire facias*, injunction *ne exeat*, subpoena, and in general all writs necessary to the exercises of its jurisdiction and agreeable to the practice and principles of law.

The court has its own marshal, clerk and reporter. Its official decisions, which are conclusive authority in all federal courts are reported. They are usually quoted in the name of the reporters as far down as Otto; thus 2 Peters, 4 Wheaton, 1 Black, 8 Wallace, 6 Otto; after that reporter, they are quoted as U. S. Reports, giving the whole number as 136 U. S. The Lawyers' Co-operative Association have also published a full series of Supreme Court Reports. The West Publishing Company publish weekly reports of the decisions of the Supreme Court quoted as Supreme Court Reports.

CIRCUIT COURT OF APPEALS.

The next federal court in the order of rank is the circuit court of appeals. As has been said the business of the Supreme Court, growing with the rapid growth of the country, increased to such enormous proportions, that the court could not dispose of it. Although it is perhaps the most laborious court in the Union, the end of each session found its docket larger than when the session began. When a case was entered in that court, it could not be reached and disposed of under three years, more often under four years. Not only did this work great inconvenience and delay, but it was also taken advantage of in order to secure delay on the part of disappointed litigants. Many cases having no merit were carried up, and when they were reached after years of waiting, were dismissed or discontinued. To meet this evil Congress established in each circuit, a circuit court of appeals. As there are nine circuits, there are nine of these courts. They dispose of the appellate business committed to them, coming up from the circuit and district and territorial courts within their circuit. Whilst the decisions of a circuit court of appeals are not conclusive authority on the other circuit courts of appeals of the same paramount authority as are the decisions of the United States Supreme Court, yet they are authority of the highest persuasive character, and are entitled to great respect. Uniformity of decision is of the utmost importance. These appellate courts recognize this and in so far as is consistent with conscientious independent judgment, they strive to attain the uniformity of decision. When they do differ the decision of the Supreme Court is sought as a final and conclusive arbiter.

To each circuit under the provisions of the law is assigned a justice of the Supreme Court, by an order of that court. The circuit justice and the circuit judges of each circuit are the permanent members of the circuit court of appeals of that circuit. In case of the absence, inability or disability, and by

parity of reasoning in case of a vacancy, of one or more of these permanent members of the court, the place or places of the justice or judge is supplied by a district judge of the circuit. To this end all the district judges of a circuit are declared members of the circuit court of appeals of that circuit. The district judges do this service by a roster made up according to seniority of commission. In practice one district judge at least attends each meeting of the court. The court is composed of three judges and no more, but two judges can sit and hear and decide cases, making a quorum for the transaction of business. The place of meeting of each court is at some central place or places within the circuit, and the court has the power of adjourning its meeting elsewhere in the circuit, to meet the exigency of the business before it. No judge of the court can sit in it upon a case with which he has had any connection as counsel or judge in the court below.

The jurisdiction of the court is fixed by statute. At the risk of repetition it will be stated.

The act (March 3, 1891) first defines the appellate jurisdiction of the Supreme Court, making it as to the classes stated exclusive. Cases in which the jurisdiction of the courts is in issue. That is the initial question of jurisdiction of that court. Final sentences and decrees in prize cases, conviction of capital or otherwise infamous crimes, cases involving the Constitution or application of the Constitution of the United States. Cases in which there is drawn in question the constitutionality of any law of the United States, or the validity or constitutionality of any treaty made under its authority. Cases in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

In all other cases the circuit court of appeals can exercise appellate jurisdiction to review by appeal or writ of error, final decisions in the districts courts and in the existing circuit courts unless otherwise provided by law. But whilst it can

thus exercise appellate jurisdiction over all cases, those placed in the hands of the Supreme Court excepted, its decisions are final only in the following cases:

1st. Where the jurisdiction of the court below is dependent entirely upon the opposite parties to the suit or controversy; that is to say, where the court below has jurisdiction of the case because the suit or controversy is between citizens of different States, or between citizens of the United States and aliens, or between citizens of the United States and a foreign State.

2d. All cases arising under the patent laws.

3d. All cases arising under the revenue laws.

4th. All criminal cases in which the crime is not capital or otherwise infamous.

5th. All admiralty cases.

In all these five classes the decision of the circuit court of appeals is final. But if any question or questions arise in any of these cases concerning which the circuit court of appeals entertain a doubt, they certify this question or these questions up to the Supreme Court, and ask its decision thereon. An instance of this kind may be found in *Bate Refrigerating Co.*, v. *Sultzberger*, 157 U. S., page 1. In any such case the Supreme Court may content itself with answering the questions or it may require the whole record to be sent up and thereupon hear and decide the whole case for itself. Or the Supreme Court of the United States itself, may by writ of certiorari to a circuit court of appeals, require it to send up all the record of any case decided by it for its review and determination, with the same power over it as if the case had been originally carried there. These provisions of law are essential to secure uniformity of decision in the federal courts. And they save conflict with the constitutional requirement, that there be one Supreme Court, that is but one court whose decisions shall be absolutely final.

To all other cases carried to the circuit court of appeals, outside of these five classes, there lies a writ of error or an appeal to the Supreme Court of the United States, provided that the matter in controversy exceeds $1,000 and costs. Cases of this character are those to which the United States is a party. Cases between persons claiming lands under grants from several States, &c. &c.

The appellate jurisdiction of the circuit courts of appeal is exercised in the same way and under the same practice as that of the Supreme Court. To all errors of law, in cases at law, in the courts below, there lies the writ of error, in all other cases, equity and admiralty, there lies the appeal. The leave for the writ of error and that for the appeal is obtained in the same way and upon the same conditions. But whilst in the Supreme Court, these may be sued out within two years from the date of the final judgment, in the cases carried to the circuit court of appeals the writ of error must be sued out or the appeal taken within six months.

Another distinction exists between the appellate jurisdiction of these courts. No writ of error can be sued out or appeal taken to the Supreme Court, except on final judgment or decree. The circuit court of appeals can take jurisdiction of an appeal from an order of the court below, granting or refusing an injunction although this be an interlocutory order, that is an order not ending the merits of the case. 28 Statutes at Large, 666.

When one loses a case in a circuit or district court of the United States, it sometimes becomes a question of difficulty determining whether to carry the case up to the circuit court of appeals or to the Supreme Court. He cannot take the case up to both courts. The act of Congress on this subject does not contemplate two writs of error or two appeals. (*United States* v. *Jahn*, 155 U. S. 109).

This seems to be the rule. If the only question made in the lower court is that it has no jurisdiction of the case, this

question is certified up to the Supreme Court by the judge who tried the case, and after final judgment the case will be reviewed there. A formal certificate is not absolutely necessary if the record shows that the question of jurisdiction was the only question in the case. *Carey* v. *Houston, &c., Railway*, 150 U. S. 171. *In re Lehigh Mining Co.*, 156 U. S. 322. *Sheilds* v. *Coleman*, 157 U. S. 168. If, however, besides the question of jurisdiction there are other questions involved in the case, which under the law can be reviewed in the circuit court of appeals, then the proper course is to take the case to the circuit court of appeals. That court will decide all the questions but that of the jurisdiction, and if it become necessary that it should be decided, will certify it up to the Supreme Court. (*McLish* v. *Roff*, 141 U. S. 761). He has the election it is true, to go either to the Supreme Court or to the circuit court of appeals, but if he takes a case of this character to the Supreme court, that court will decide only the question of jurisdiction and none of the other questions. (*McLish* v. *Roff*, *supra*).

But where the questions involved in the case are the construction of the Constitution of the United States or the laws passed or treaties made thereunder, or as it is sometimes stated, the construction or application of the Constitution of the United States, then the case can go to the Supreme Court only. And if besides these, there are other questions involved, which by themselves, might have been taken to the circuit court of appeals, the Supreme Court will take jurisdiction of them and of the entire case and will decide it. (*Horner* v. *The United States*, No. 2, 143 U.S. 576–7). But the questions involving the construction or the application of the Constitution of the United States, must be the controlling questions in such a case; that is to say, no proper conclusion can be reach in it without deciding them. (*Carey* v. *Houston, &c. Railway*, 150 U. S. 171).

There is a case which presented this difficulty in the greatest

degree. It may be instructive. You will find it among the decisions of the circuit court of appeals of the Fourth Circuit. It is known as *Green* v. *Mills* and is reported in Vol. 16 C. C. A. Reports, page 521. In that case a citizen of the State of South Carolina filed his bill against a supervisor of registration in that State, charging that the registration law violated the Constitution of the United States and praying an injunction against him in further registration of voters. The case was heard in the circuit court on the motion for injunction. The defendant in his return to the rule for injunction, denied that the law infringed the Constitution of the United States, and also denied that the court of equity could injoin the refusal of a political right; that the remedy for such refusal was in a court of law. The circuit court held that the registration law violated the Constitution of the United States, and notwithstanding the other objection, issued the injunction.

You will remember that although the general rule is that an appeal will only lie from a final decree, an exception is made in appeals to the circuit court of appeals. To these courts an appeal will lie from an order granting or refusing an injunction, provided the case in which the injunction was granted was one which after final judgment could be carried to the circuit court of appeals. An appeal was taken in this case to the circuit court of appeals from the order granting the injunction. And in that case it was held there were two questions in the case; one whether the registration law of South Carolina was in conflict with the Constitution of the United States, and the other, whether a court of equity could pass upon and take jurisdiction of a question involving the denial of a political right. That the first question was to be solved only in the Supreme Court, but that it was not the controlling question. That if the court below (the circuit court) could not take jurisdiction of the political question as a court of equity, it could not grant the injunction whether the registration law was constitutional or not. That the circuit court of

appeals had jurisdiction over this last question and could hear and decide the case on that. The court concurred with the appellant, and dissolved the injunction.

THE CASES CAN THUS BE SUMMED UP.

If the case in the trial court depends on the question of the jurisdiction of the court only, the decision can be reviewed in the Supreme Court only.

If the questions in the case are such as involve only the construction or application of the Constitution of the United States, the decision can be reviewed in the Supreme Court only.

If there are with these questions as to the construction or application of the Constitution of the United States, other questions which are not of this Federal character, then the case can be reviewed in the Supreme Court, which will hear and decide all the questions in the case.

I am not prepared to say whether such a case can or cannot be carried to the circuit court of appeals.

If the case involve a question of jurisdiction of the court, and beside this, other questions which the circuit court of appeals can decide, then the best course is to take it to the circuit court of appeals, which will hear and decide every other question but that of jurisdiction, and if it sustain the court below, will certify the question of jurisdiction to the Supreme Court. But if the party losing the case is willing to risk it on the question of jurisdiction only, he can take it direct to the Supreme Court, which will decide no other question than that of jurisdiction.

It will be seen from what has been said, that the circuit court of appeals exercises a very important jurisdiction. It is the court of final resort on all questions coming up in the Federal courts, relating to mercantile and commerce law and the vast railroad interests of the country. Its jurisdiction over patent cases, and all admiralty cases, reaches transactions of great interest to the people of the United States. The super-

vision of the Supreme Court over its decisions on these questions is never exercised except in extraordinary cases. These courts give the greatest relief to the docket of the Supreme Court, and already that great tribunal is feeling the benefit of it.

Each circuit court of appeals is organized by the appointment of its own clerk and reporter. The marshal of the district within which its sessions may be held is ex officio the marshal of the court. Their decisions are known as U. S. Appeals, and are so quoted 1 U. S. Appeals, &c. The present reporter, S. A. Blatchford, Esquire, is the official reporter of all the circuit courts of appeal. The West Publishing Company, with characteristic enterprise, also publishes their decisions, not only in the federal reporter, but in a separate series of reports known as C. C. A. (circuit court of appeals). With some modifications and amendments, which it is not our province to discuss here, the courts can be made much nearer perfection than they are at present.

THE CIRCUIT COURTS OF THE UNITED STATES.

The circuit courts were established in 1789, immediately after the adoption of the Constitution.

The whole country is divided into districts, and the several districts are grouped so as to form circuits. In each district a circuit court is created. At present there are in the United States 69 districts, arranged in nine circuits. It may not be uninteresting to see how the circuits are arranged.

Ths First Circuit consists of the districts of the States of Maine, New Hampshire, Massachusetts and Rhode Island.

The Second Circuit consists of the districts in the States of Connecticut, New York (3 districts) and Vermont.

The Third Circuit consists of the districts in the States of New Jersey, Pennsylvania (2 districts) and Deleware.

The Fourth Circuit consists of the districts in the States of Maryland, Virginia (2 districts), West Virginia, North Carolina (2 districts), and South Carolina.

The Fifth Circuit consists of the districts in the States of Florida, Georgia, Alabama, Mississippi, Louisiana and Texas.

The Sixth Circuit consists of the districts in the States of Kentucky, Michigan, Ohio and Tennessee.

The Seventh Circuit consists of the districts in the States of Illinois, Indiana and Wisconsin.

The Eighth Circuit consists of the districts in the States of Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, the two Dakotas and Wyoming.

The Ninth Circuit consists of the districts in the States of California, Montana, Washington, Nevada, Oregon, Idaho and Alaska.

To each of these circuits is assigned a Justice of the Supreme Court. The Fourth Circuit, from the time of Chief Justice Marshall, has been the circuit to which the Chief Justice has been and is now assigned.

The judges of the circuit court are the Supreme Court justice, called the circuit justice, the circuit judges and the district judge of the district in which the court sits. When the circuit justice and the circuit judge are present, the district judge cannot sit, except through courtesy. In the Southern District of New York, a circuit judge and two district judges sit in criminal cases. *In re Claassen*, 140 U. S. 200. When either the circuit justice or the circuit judge is absent, the district judge becomes a member of the court by right and sits as such. In the absence of both the circuit justice and the circuit judge, the district judge sits and administers the court with all of its powers. Revised Statutes § 609. When a circuit court is sitting with more than one judge present it can divide itself, so that in one room a judge may try a case before a jury, in another may try a criminal case and another may hear an equity case. Revised Statutes § 611. When two judges hold the court, and differ upon any question, the opinion of ranking judge prevails and is the opinion of

the court. The circuit courts have both civil and criminal jurisdiction.

The jurisdiction of the circuit courts of the United States, in suits of a civil nature, as now fixed by law is defined in the Act, 18th August, 1888, 25 Statutes at Large of the United States, 433. This act must be read in *pari materia* with the Act of March 3d, 1875, 18 Statutes, 470.

The act of 1888, gives to the circuit court an original jurisdiction, and also jurisdiction over causes removed into it from the State courts upon certain conditions.

ORIGINAL JURISDICTION.

The circuit courts of the United States have original cognizance concurrent with the State courts of all suits of a civil nature, at common law and in equity.

1st. Arising under the Constitution or laws of the United States or treaties made or which shall be made thereunder, when the matter in dispute exceeds, exclusive of interest and costs, $2,000.

2d. In a controversy in which the United States are plaintiff or petitioner; apparently without regard to the value of the matter in dispute. *United States* v. *Sayward*, 16 Supreme Court Reports, 371.

3d. In a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and cost, the sum or value of $2,000.

4th. Of a controversy between citizens of the same State, claiming lands under grants of different States. Here no mention is made of the value of the matter in dispute and apparently there is no such limit. Compare *United States* v. *Sayward*, *supra*.

5th. Of a controversy between citizens of a State and foreign States, citizens or subjects in which the matter in dispute exceeds, exclusive of interest and cost, the sum or value of $2,000.

All crimes and offences cognizable under the authority of law, that is the law of the United States, except such as are otherwise provided by law for the district court and concurrent jurisdiction over all crimes and offences cognizable by that court.

With regard to the criminal jurisdiction we may not linger. There are no common law offences in the United States courts, nor have they any jurisdiction over common law offences. Every crime cognizable in that court is made so by statute. And all indictments are on the statute.

III

When last we met, we were about to enter upon an examination of the circuit courts of the United States. Their general jurisdiction has been stated. Let us go more into detail.

WITH REGARD TO THE CIVIL JURISDICTION.

1. To give jurisdiction there must be a suit of a civil nature. We have heretofore given the definition of this term suit, by Chief Justice Marshall, in *Weston* v. *City Council*, 2 Peters, 499, any proceeding in a court of justice by which an individual pursues the remedy which the law affords him. It must be a suit at common law or in equity. This excludes all admiralty cases. If the cause of action arise under the Constitution and laws of the United States, or treaties made thereunder, the circuit court has jurisdiction of it without regard to the citizenship of the parties to the controversy. But the matter in dispute must exceed in value the sum of $2,000 without including interest and costs. The matter in dispute. This phrase is defined by the Supreme Court in *Smith* v. *Adams*, 130 U. S. 168. "By this phrase as used in the statutes conferring jurisdiction on this court is meant, the subject of litigation, the matter upon which the action is brought and issue is joined and in relation to which, if the issue be one

of fact, testimony is taken. Its pecuniary value may be determined, not by the money judgment prayed alone, but in some cases by the increased or diminished value of the property directly affected by the relief prayed or by the pecuniary result to one of the parties immediately from the judgment."

"In *Kanouse* v. *Martin*, 15 Howard, 198. The matter in dispute is said to be what the plaintiff claims. If there be more than one plaintiff or complainant, the interest of each of them in the matter in dispute must exceed $2,000, beside interest and costs, unless they all claim under the same title as in *Shields* v. *Thomas*, 17 How. 3, and the determination of the cause necessary involves the validity of that title and the value of the thing whose title is to be decided exceeds $2,000, beside interest and costs. The distinction you will find marked in *North Pacific Railway Co.* v. *Parker*, 143 U. S. at page 51, and *Walter* v. *North Eastern R. R. Co.*, 147 U. S. 370.

2. When the controversy is between citizens of different States, and the matter in dispute exceeds $2,000, not including interest and costs. The controversy must be between citizens of States. The court has no jurisdiction as between a citizen of a State and a citizen of a Territory or of the District of Columbia. And this also has its limitations. No person can be arrested in one district for trial in another. No suit can be brought in this court against any person by any process or proceeding in any other district than that in which he is an inhabitant, and where the jurisdiction is entirely dependent on the citizenship of the parties, it shall be brought only in the district in which the plaintiff or defendant resides. If the plaintiff is the assignee of a chose in action, including in this phrase promissory notes, he cannot maintain an action in the circuit court on such chose in action, unless such action could have been brought in the court without such assignment. *Morgan* v. *Day*, 19 Wall, 81. And this even if the promissory note be made payable to bearer and pass by delivery only.

Act of 1888, 25 Stat. at Large, 433. But if the promissory note be made by a corporation, he can sue in the circuit court. Foreign bills of exchange are excepted from the general rule as to choses in action, and suit on them will be entertained in the Federal courts, all other conditions being complied with. If there are several plaintiffs, each plaintiff must be competent to sue, and if there be several defendants, each defendant must be liable to be sued in the circuit court. *Smith* v. *Lyon*, 133, U. S., 315. For example: A citizen of Maryland joins with B., a citizen of Virginia, and brings a suit in the circuit court for the Eastern District of Virginia, against C., a citizen of Virginia; the action will not lie. So if A., a citizen of West Virginia, and B., a citizen of Pennsylvania, bring their action against C., a citizen of Ohio, in the circuit court for the District of West Virginia, it will not lie. If A. had sued alone the court could take jurisdiction because West Virginia was the State of his residence. But West Virginia was not the State of the residence either of B. or of C., hence under the rule the action would not lie. This diversity of citizenship must exist at the time when the action is brought. If, during the progress of the case the parties become citizens of the same State, or one of the parties should die and his executor be a citizen of the same State with the other party, this will not affect the jurisdiction. When one, in order to obtain the jurisdiction of the United States Court, transfers his citizenship bona fide from one State to another, this will not prevent the jurisdiction. But if he do this *mala fide* for the purpose of committing a fraud on the law, if he change his domicil *sine animo manendi*, but with the determination to leave the State into which he has gone as soon as he can do so without defeating jurisdiction, his removal will not aid him, nor will the circuit court take jurisdiction. [*Morris* v. *Gilmer*, 129, U. S., 315]. If an action be brought between citizens of different States, but not in the residence of either party, this objec-

tion may be waived and the cause proceed, if the court has jurisdiction of the subject matter. *Central Trust Co.* v. *McGeorge*, 151 U. S., 129.

The large portion of the business of this country is done by corporations ; corporations are artificial persons, and speaking strictly, are not citizens. At first the circuit courts looked into the citizenship of the corporators, and if all of them were citizens of different States from the other parties, they would take jurisdiction. But if one or more of the corporators were citizens of the same State with the other party, they would not take jurisdiction. *Bank* v. *DeVeaux*, 5 Cranch, 61. *Commercial, &c. Bank* v. *Slocomb*, 14 Peters, 60. But the business of the country demanded broader views than these. The rule was modified. First the courts decided that they would conclusively presume that the corporators of a corporation were citizens of the same State as the corporation, and would not permit an averment to the contrary. *Louisville, C. & C. R. R.* v. *Letson*, 2 Howard, 497 ; *Steamship Co.* v. *Tugman*, 106 U. S., 118 ; *Muller* v. *Dows*, 94 U. S., 444. At last the rule became fixed that in all cases where a Federal court can take jurisdiction of controversies between citizens, it will take jurisdiction of controversies between corporations and treat them as citizens of the State, under whose laws they were created. [*Kansas Pacific Ry. Co.* v. *Atcheson, &c., R. R.*, 112 U. S., 414.]

For the purposes of jurisdiction, therefore a corporation is a citizen of the State in which it is created, and in which it has its principal place of business. *So. Pac. Co.*, v. *Denton*, 146 U. S., 202. This determines it right to sue or to be sued. Even the consolidation of two corporations will not change this result. *Nashua Railroad* v. *Lowell Railroad*, 136 U. S., 356. Nor can a corporation become a resident or inhabitant in a jurisdictional sense of any other State than that of its incorporation or creation. And the agreement of the corporation

to accept service of process in a State in which it was not created will not estop it from taking advantage of its citizenship or residence to defeat the action. *Southern Pacific Co.* v. *Denton*, 146 U. S., 202; *Shaw* v. *Quincy*, 145 U. S., 453.

The act speaks of a controversy between citizens of different States. In order to determine the jurisdiction it is necessary to ascertain what is the controversy, and if there be several parties to the suit, how they stand with regard to this controversy. If, in arranging those who contend for the same view of this controversy on one side and those taking an opposite view of the controversy on the other, it be found that the contestants on one side are all citizens of States, in which the contestants on the other side are not citizens, the jurisdiction can be maintained without regard to the place they occupy in the record. For example: Proceedings are taken to set aside conveyances as fraudulent by two or more persons, citizens of the State of New York, against citizens of the State of Virginia, and there are made parties defendant, a citizen of the State of Maryland and a citizen of the State of North Carolina, who also are creditors of the Virginia debtor, and interested in setting aside the conveyances. The jurisdiction can be maintained, although the citizens of Maryland and North Carolina are co-defendants with the Virginian, because the controversy is between these citizens of Virginia and the other parties citizens of other States.

But although in an original suit in which the jurisdiction depends on this diversity of citizenship, the diversity must exist, yet any proceedings ancillary to such original proceedings, can be had regardless of the citizenship of the parties *Krippendorf* v. *Hyde*, 110 U. S., 276. That is to say, a suit growing out of a suit over which the court has jurisdiction, brought to carry it into effect or to secure the advantages provided in it, or a suit growing out of and dependent upon the former suit, is an ancillary suit. *Clark* v. *Matthewson*, 12 Peters,

164. Such a suit can be maintained without any regard to the citizenship of the parties. *Root* v. *Woolworth*, 150 U. S., 401.

For example, a creditors' bill is filed in the Federal court, and all creditors are called in; any creditor without regard to the relative citizenship between the complainant and himself, can come in and prove his claim. *Krippendorff* v. *Hyde, supra.* So in all cases of claims by or against a receiver appointed by the court. *Milwaukee Co.* v. *Soutter*, 3 Wall, 609. You will find an excellent case in *White* v. *Ewing*, 159 U. S., 39.

Mr. Foster in his excellent treatise on Federal practice, section 21, gives some illustrations. He says: "Not only can a bill of review or a supplemental bill be maintained in a Federal court which had jurisdiction of the original litigation (without regard to the citizenship of the parties) but so can a bill to restrain or to regulate or to set aside or to obtain a judicial construction of or to inforce a judgment or decree of a Federal court. A bill for the reformation of a policy of insurance is ancillary to an action on the policy."

3. A controversy in which the United States are plaintiff or petitioners is another ground for jurisdiction of the circuit court. It will be observed that this confines the jurisdiction to the cases brought by the United States.

Under another act, however, an act to provide for bringing of suits against the United States, March 3d, 1887, (24 Statutes at Large, 505), the Circuit Court of the United States is clothed with jurisdiction to hear and determine all claims against the United States, founded upon the Constitution of the United States or any law of Congress (except for pensions), or upon any regulation of the executive department or upon any contract expressed or implied with the government of the United States, or for damages liquidated or unliquidated in cases not sounding in tort in respect of which claims, the party would be entitled to redress against the United States,

either in a court of law or equity or admiralty, if the United States were suable. But suit for specific performance to compel the issue for land patent will not lie. *United States* v. *Jones*, 131 U. S. Excepted from this act are war claims growing out of the war between the States and claims theretofore rejected, that is disallowed by any court, department, or authorized commission before the passage of this act. To give the court jurisdiction the amount of the claim must exceed $1,000 and must not exceed $10,000. You will bear in mind that no action will be against the United States for any tort. The claim must be on a contract or arising out of a contract. For illustration of this see *German Bank* v. *The United States*, 148 U. S., 573; *Hill* v. *The United States*, 149 U. S., 593. This jurisdiction is concurrent with that of the court of claims, which will hereafter be noticed.

Inasmuch as the United States, a sovereign power, was not amenable to the court except by its own consent—*United States* v. *Gleeson*, 124 U. S., 255, this act is one of grace, and a condition is imposed that all cases tried under the provision of this act shall be tried by the court without a jury. An appeal or writ of error depending on the nature of the action whether at law or in equity or admiralty (*United States* v. *Chase*, 155 U. S., 496), lies to the circuit court of appeals, or to the Supreme Court, regard being had to the questions involved. The circuit court hearing the case must cause a written opinion to be filed in the cause, setting forth the specific findings of facts thereon and the conclusions of the court on all questions of law involved in the case and render judgment thereon. *United States* v. *Tinsley*, 15 C. C. A., 507. If the case is finally decided against the government, the attorney-general reports it to Congress, which then provides an appropriation for it. In a case of this kind the circuit court may exercise jurisdiction.

4. Another ground of jurisdiction mentioned in the act of 1888 is a controversy between citizens of the same State

claiming lands under grants of different States. This jurisdiction exists, although one of the States was a part of the other when the first grant was made, as Kentucky and Virginia, or North Carolina and Tennessee. *Colson* v. *Lewis*, 2 Wheat., 377; *Pawlet* v. *Clark*, 9 Cranch, 292.

5. The last ground of original jurisdiction is over a controversy between citizens of a State and foreign States or their citizens and subjects. In these cases the matter in dispute must exceed $2,000, exclusive of interest and costs. Note here again, that citizens of a State are alone mentioned, excluding citizens of the District of Columbia and of the Territories. And also that a citizen of a State must be on one side or the other of a case; the court has no jurisdiction between aliens alone. We are speaking of circuit courts. But in admiralty, which is within the jurisdiction of the district courts, the Federal courts do take jurisdiction between aliens. As an instance of this see the Belgenland, 114 U. S., 355. *Montalet* v. *Murray*, 4 Cranch, 46.

Besides the jurisdiction conferred in this act of 1888, the circuit courts of the United States have original jurisdiction, both civil and criminal, under the act of 1890, to protect trade and commerce against unlawful restraints and monopolies. (26 Statutes at Large, 200.) This act declares every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, illegal and void. Any person engaging in any such contract, combination, or conspiracy is declared guilty of misdemeanor; and all monopolies are also forbidden. An action is given to any person injured in his business or property by any other person or corporation by reason of anything forbidden in that act, to be sued in any circuit court of the United States, in the district where the defendant is found, without respect to the amount in controversy, and without reference to the citizenship of the parties.

There is another class of cases in which the Circuit Court of the United States has jurisdiction. If any common carrier violates or neglects or refuses to perform any lawful order of the Interstate Commerce Commission, the commission or any company or person interested in the order can apply in a summary way by petition to the Circuit Court of the United States, sitting in equity in the judicial district where the common carrier complained of has its principal residence or in which the violations of the order happen. The court sitting in equity hears and determines the complaint without formal pleadings, and decides the same according to the rules of equity, and enforces its decisions with all interlocutory or final orders necessary thereto. 26 Statutes at Large, 743.

Yet another jurisdiction is vested in the circuit courts. Congress under the act of June 10, 1890, 26 Statutes at Large, 131, act to simplify the laws in relation to the collection of revenue, provided for a board of nine general appraisers of merchandise. They settle disputes between importers and the collectors of ports as to duties on merchandise. Either party dissatisfied with their conclusion, can go into the circuit court and have it reviewed. The conclusion of the court is final so far as the importer is concerned, unless the court thinks the case of sufficient importance to go to the Supreme Court. The right of the United States, however, to a review by the Supreme Court is absolute.

The jurisdiction of the court must be made to appear in the record, for all circuit courts of the United States are courts of limited jurisdiction ; that is to say all the facts necessary to give the court jurisdiction must appear in the record. The presumption is that a cause is without the jurisdiction of the circuit court unless the contrary is made to appear. *Grace* v. *Insurance Co.*, 109 U. S., 278. The court *suo motu* will take notice of its want of jurisdiction. So stringent is this rule that it is not sufficient to state the jurisdictional facts in the

title of the case; they must be in the record itself. The words limited jurisdiction have been used. The use of these words in connection with the circuit courts of the United States is so well explained by Judge Curtis, in his lectures on the jurisdiction of the United States Courts (which by the way are earnestly recommended to your examination and study) that his words are used: "I think it proper to premise here that although this is only a limited jurisdiction, limited first by the character of the parties and secondly by the nature of the subject matter involved in the suit, still any party who has the right and comes into the circuit court of the United States, finds a court clothed with entire power to do justice according to law or according to equity whichever he appeals to. Although this is a court of limited jurisdiction, the limits of the jurisdiction are limits which affect the persons who may come there or the subjects which may be brought there. But when a person has a right to come there or the subject is one which can be brought there under the Constitution and laws of the United States, the court has entire power as a court of equity or of law to do justice between the parties. It is not a court of limited jurisdiction in any other sense than that now explained." (Curtis' Jurisdiction U. S. Courts, 109.)

Consent of parties cannot give jurisdiction. But all other conditions of jurisdiction being satisfied, a party can waive the requirement, that suit be brought in the district of the residence of plaintiff or defendants for this is a personal privilege and the cause may be tried in another circuit court.

REMOVAL OF CAUSES.

In addition to the original jurisdiction of the circuit courts of the United States as fixed by the act of 1888, the courts have jurisdiction over causes originally brought in the State courts and removed into the circuit court. This right of removal applies to criminal and civil cases. In civil suits there are two classes of removal cases.

1st. Any suit of a civil nature at law or in equity arising under the Constitution of the United States, and the treaties and laws made thereunder, and any other suit of a civil nature, in law or equity, jurisdiction over which is given by the section of this act which has been discussed above, may be removed by the defendant therein, to the circuit court of the United States for the proper district. And if in the suit there be a controversy wholly between citizens of different States, and this can be fully determined as between them, one or more of the defendants actually interested in such controversy may also remove it.

Sometimes it occurs that in the same suit in the State court there are several parties and several issues or controversies. If in such suit there be a party defendant, whose interest is so separate and distinct from that of the other defendants, that it can be fully determined as between him and the plaintiff, without the presence of the other parties, such defendant can obtain the removal of his controversy into the United States Court, if he and the plantiff be citizens of different States, and the other conditions exist. *Mitchell* v. *Small*, 140 U. S., 406; *Merchants' Cotton Press* v. *Ins. Co. of North America*, 151 U. S., 368. This is called a separable controversy, and the question whether it is such a controversy must be determined by an inspection of the record in the State court, and not by any allegations of the petition for removal, unless the petitioner can both allege and prove that he was wrongfully joined as defendant to defeat the jurisdiction of the United States Court. *L. & N. R. R. Co.* v. *Wangelin*, 132 U. S., 599.

You will notice that no cause can be removed from a State court to a Circuit Court of the United States, except it be one which comes within the class of cases of which the circuit court has jurisdiction. That this right of removal is confined to the defendant or defendants. A plaintiff having chosen his tribunal must abide by his selection. In order to secure such

removal the party desiring it must file his petition in the State court in which the action is pending at the time, or at any time before the defendant is required by the laws of the State or the rule of the State court, in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff. The petition must pray for the removal of the suit, stating the grounds therefor, and must be accompanied by a bond with surety, that the petitioner will enter in the United States Circuit Court, for the district in which the State court is, at the first day of its session next thereafter, a copy of the record of the suit, and also that he will pay all costs of such removal, if the circuit court shall hold that it was wrongfully or improperly removed. We will dwell on this a short time as it is a matter of frequent occurrence in practice.

The petition must be filed in the State court. The petition must state and the record must show that it is a removable case. If the facts stated in the petition be denied, the issue of fact can be tried nowhere but in the Circuit Court of the United States. (*Kansas City, &c.*, v. *Daughters*, 138 U. S., 298). The burden of proof is on the petitioner. (*Carson* v. *Dunham*, 121 U. S. 421).

If the petition with the record discloses facts which show the right to remove, as soon as it and the proper bond are filed in the State court, the cause is practically removed and the jurisdiction of the State court ceases at once. (*R. R. Co.*, v. *Kountz*, 104 U. S., 5). No order of the State court is necessary to the removal. (*Kern* v. *Huidekoper*, 103 U. S., 485). And if the State court refuses an order for removal, the party seeking it can still go on, obtain a certified copy of the record in the State court and docket his case in the circuit court. When this is done he can defend in the State court without prejudice to his right to remove (*R. R. Co.*, v. *Dunn*, 19 Wall, 214, Removal Cases 100 U. S., 457); and if the State court of last resort sustain the action of the lower court, he

can carry his case by writ of error to the Supreme Court. *R. R. Co.*, v. *Kountz, supra*). This is a Federal question. (*Oakley* v. *Goodnow*, 118 U. S., 43). When the law requires the petition and bond to be filed in the State court, it means filed as all other papers are filed, in the clerk's office, whether the court be in session or not. (*Brown* v. *Murray*, 43 Federal Reports, 614). There is some confusion in the courts on the question whether the petition must necessarily be presented to the State court. (*Brown* v. *Murray, supra*; *Shed* v. *Fuller*, 36 Federal Reports, 609). Doubtless it should be, both from the spirit of the act and from motives of comity. (*See Crehore* v. *Ohio & M. R. R. Co.*, 131 U. S., 240). But if it be a proper case for removal, the adverse action of the State court cannot prevent the removal. On the whole subject, see *Stone* v. *South Carolina*, 117 U. S., 430.

The petition must be filed at the time or at any time before the defendant is required by the laws of the State court or by the rule of the State court in which the action is brought, to answer or plead to the declaration or complaint. No consent of parties can extend this time. The petition must be filed on or before the day the defense is due by law or the rule of court. In one case decided by the Supreme Court, the justice delivering the opinion says, that the petition must be filed on or before the day that the defendant is required in the State court to make any defense whatever, either in abatement or on the merits. (*Martin* v. *B. & O. R. R.* 151 U. S., 673). This, however, was not necessary to the decision of the case which went off on another ground and is an *obiter dictum.* If the proper petition showing the necessary amount, with a proper bond, is filed within the time and the State court refuses to consent to the removal, the party seeking it can procure a transcript of the record and file that in the United States court, where it will be docketed. The cause comes into the United States court precisely in the same plight in every re-

spect as it left the State court. The period between the filing of the petition and the docketing of the cause in the United States court is a period of suspension; that is to say, if the defendant, when petition was filed, had so many days left within which to make his defense, the currency of these days is suspended until the cause is docketed in the United States Court. (*Pelser Manufacturing Co.*, v. *St. Paul*, 40 Federal Reports, 185). If the other party be dissatisfied with the removal, he makes his motion in the United States Circuit Court to remand the cause to the State court. The proper practice is to file a petition setting forth the grounds for this motion. On this petition, issues either of law or fact are joined. The cause is heard, and the decision of the circuit court refusing to remand the case is not reviewable on the point until after final judgment. If the case be remanded no appeal will lie (25 Stat., 433). If the cause is not remanded it proceeds to a conclusion under the rules and practice of the Federal court.

The motion to remand must be made in the circuit court. It is too late to make it after the cause has been heard on the merits; and if the ground of the motion is that the petition for removal was not filed in time, delay in taking advantage of this will be treated as a waiver of the objection. *Martin* v. *B. & O. R. R. Co.*, 151 U. S. at page 688.

There is another class of civil cases which can be removed from the State court to the Circuit Court of the United States. If the action in the State court be between citizens of that State and the title to land is concerned, one or more of the parties plaintiff or defendant, at any time before the trial, may state to the court on oath, if the court require it, that they claim and shall rely for title under a grant from a State. They must produce the original grant or an exemplification of it, except where a loss of public records puts it out of their power and then they can prove it by secondary evidence apparently. Thereupon they can move the court that the other party in-

form the court, whether they do not claim under grant from another State. The other party must give this information or be debarred the right of pleading such grant or giving it in evidence. If the reply is that they rely on such grant, then the other party on petition and bond as above, may remove the cause for trial into the United States Court. 25 Statutes at Large, 433.

There is still another class of civil cases which can be removed. If there be a suit or controversy between citizens of different States in a State court and the defendant can make it to appear by a full statement of facts, to the satisfaction of the United States Circuit Court, that from prejudice or local influence he will not be able to obtain justice in that State court or in any other State court to which he could remove his cause, he can file his petition in the United States Circuit Court, stating all these facts fully and giving a proper bond therewith, whereupon, if the court think it a fit case for removal, it will sign an order to that effect which order must be filed in the State court, and thereupon the cause will be removed into the United States Circuit Court. *Pennsylvania Co.*, v. *Bendes* 148 U. S., 258. Provided, always, however, that the matter in controversy exceeds $2,000 beside interest and costs, and the parties on one side are all citizens of a different State from the party on the other side. If the petition is filed before the final hearing it is in time even if there had been a trial which was set aside and new trial ordered. *Fisk* v. *Howard*, 142 U. S., 459.

The books are full of cases upon removal of causes. Judge Dillon and Judge Speer have written full and valuable treatises on the subject.

For our present purposes this brief outline is deemed sufficient.

There is also a right of removal in criminal as well as civil cases.

By section 643 of the Revised Statutes of the United States, when any civil proceeding or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or person under such law, the said suit or prosecution at any time before the trial or final hearing thereof, may be removed for trial in the Circuit Court of the United States, next to be holden in the district where the same is pending, upon petition of the defendant to the Circuit Court of the United States. *Tennessee* v. *Davis* 100 U. S., 257.

This privilege of removal is confined to an officer appointed under a revenue law or some one acting under his authority. The removal can only take place after indictment found in the State court and before trial. *Virginia* v. *Paul*, 148 U. S., 107. The removal is effected either by service of a writ of certiorari upon the State court or of a writ of *habeas corpus cum causa* upon the person having defendant in custody. (Ibid.)

When the case gets into the Circuit Court of the United States it is tried upon the indictment presented by the grand jury in the State court and framed with the assistance of its law officers. An interesting discussion of cases of this character will be found in *Tennessee* v. *Davis*, 100 U. S., 257, and *Virginia* v. *Paul*, 148 U. S. 107.

So also any civil suit or criminal prosecution arising out of civil rights, can be removed if it appear that the petitioner cannot get justice in the State courts—sections 641, 2, 3, and 722; title 24 Revised Statutes of the United States and Act of 1875. "An act to protect all citizens in their civil and legal rights."

It will be seen that there are two modes of removing cases

from the State courts into those of the United States, and on but one ground, that the cases depend either on some construction of the Constitution of the United States, or treaties or laws passed thereunder or on some rights secured thereby.

One mode is by writ of error or appeal from final judgment of a State court of last resort, and only into the Supreme Court.

The other made is by removal of a case before or immediately upon filing a defence from a State court at *nisi prius*, into a circuit court of the United States, where the issues are heard and decided. Thus the final decision on all Federal questions is given to the one Supreme Court of the United States. And uniformity of decision is secured.

PROCEDURE AND PRACTICE IN UNITED STATES CIRCUIT COURTS.

The distinction between law and equity is rigidly preserved and insisted upon in the United States courts. *Fenn* v. *Holme*, 21 How, 485. The forms of procedure in law and in equity are entirely dissimilar. No case can present both legal and equitable issues. *New Orleans* v. *Louisiana Construction Co.*, 29 U. S., 45. The dockets are entirely distinct; and although the same judge administers both law and equity, he keeps the two jurisdictions apart.

This must always be kept in mind. The rule is observed strictly. If a cause be removed from a State court into the United States court, and by the law prevailing in the State, legal and equitable causes of action can be joined in one suit, as is the practice under the New York code, just as soon as it comes into the United States Court, an order is passed requiring the pleadings to be recast. So much of them as rest on a cause of action at law are put into shape for the law side of the court, so much of the pleadings as proceed on equitable causes of action, are put into the form of a bill in equity, and are heard and decided on the equity side of the court. *Hurt* v. *Hollingsworth*, 100 U. S., 100.

CASES AT LAW.

In all civil cases at law on legal causes of action and presenting legal issues, the United States Court follows the practice, pleading, forms, and modes of procedure of the State courts, it being always borne in mind that the pleadings on their face must show the jurisdiction of the court. This is expressly provided by statute, section 914 of Revised Statutes of the United States, and the language of the section expressly limits its operation to the practice, pleadings, and forms and modes of procedure in civil causes, others than equity and admiralty.

This rule includes the rules of evidence in those courts, the sufficiency and scope of the pleadings, the form and effect of the verdict, the lien and mode of enforcement of the judgment. And this practice and the pleadings are governed by the State law, and uniform State practice established by usage. (*Glenn* v. *Sumner*, 132 U. S., 152 ; *Robertson* v. *Perkins* 129 U. S., 233).

There are some differences fixed by practice. The judges of the United States Circuit Courts have more power, with respect to the jury, than State judges usually have. They can charge on the facts, can express their opinion on them to the jury, always, however, saying to the jury in express language, and so instructing them, their right finally to pass on the conflict of testimony, or the preponderance of the evidence. They can instruct a jury to find for a party if the evidence against him and all the legal inferences to be drawn therefrom have made out no case.

The language of the Supreme Court on this subject is this: Where the testimony is of such a conclusive character as would compel the court in the exercise of a sound judicial discretion, to set aside the verdict if the jury find against the opinion of the court, it can instruct the jury as to the verdict. (*Montclair* v. *Dana* 107 U. S., 162.)

Chief Justice Fuller, in an able and elaborate opinion, dis-

cusses this question in (*Louisville, &c., R. R.* v. *Woodson*), 134 U. S., 621, with this conclusion: "It is the settled law of this court that when the evidence given at the trial with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, the court is not bound to submit the case to the jury. While on the other hand the case should be left to the jury unless the conclusion follows on matters of law, that no recovery can be had on any view which can properly be taken of the facts the evidence tends to establish."

A recent case on this subject is *Treat Manufacturing Co.*, v. *Standard Steel and Iron Co.*, 157 U. S., 674. That case holds that when the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover and that if the jury render a verdict for him the court would feel bound to set it aside, he can instruct the jury to find for the defendant, and that this does not deprive plaintiff of his right to a trial by jury. But the action of the judge can be reviewed in an appellate court, if his opinion was wrong. The similarity in practice, pleading, form and mode of procedure apply only to the trial courts. The time, mode and practice of reviewing cases on appeal or writ of error are governed wholly by the rules of the United States courts. A writ of error in the United States courts lies only to errors of law occurring during a trial, regularly excepted to and formulated. No writ of error lies to the granting of or to the refusal of a new trial. (*Henderson* v. *Moore*, 5 Cranch, 11; *Emley* v. *Palmer*, 107 U. S., 3. Appeals lie from judgments or decrees on the equity side of the court, on assignments of errors both of law and fact. The details of these have been noticed in what has been said of the Supreme Court.

The judgments of the United States courts have precisely the same lien as the judgments of the State courts, and are governed in this by the laws of the State.

PROCEDURE AND PRACTICE IN EQUITY.

The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. The powers, practice, and rules of the court are the same in all the States; their practice is regulated by themselves, and by rules established by the Supreme Court, unaffected by State practice or legislation. *New Orleans* v. *Louisiana Construction Co.*, 129 U. S., 45. The equity jurisdiction of these courts cannot be enlarged by State legislation. For instance: As a general rule a right enforceable in a State court can also, all other conditions existing, be enforced in the United States Circuit Court. But if by statute of a State the jurisdiction of the court of equity in such State is enlarged and be made to extend to cases not formerly cognizable therein, this will not enlarge the power of the court of equity of the United States. In Mississippi and in other States by statute, an open creditor, one who has not reduced his claim to judgment, can file a bill to set aside conveyances made by the debtor, alleged to be fraudulent. This will not avail an open creditor in the United States court, even in Mississippi. (*Scott* v. *Neely* 140 U. S.) In *Gormby* v. *Clark*, 134 U. S., 348, Chief Justice Fuller, recognizing this doctrine, says: "However, that if equitable rights be enlarged by a State they can be administered by Circuit Courts of the United States when the case is one of a remedial proceeding essentially of an equitable character."

The practice in equity in the United States Courts is regulated by the laws of Congress, and by the rules of the Supreme Court, adopted under the authority of Congress, which have the force of laws. One of these rules, the ninetieth, is that when not otherwise directed, the practice of the High Court of Chancery in England shall be followed. The rules of the Supreme Court, fixing the practice, are those known as the equity rules. They can be found in Desty's Federal Procedure

in full. The practice of the High Court of Chancery is shown in Daniel's Chancery Pleading and Practice, which is full authority. The other authorities are Mitford on Pleading, Story on Pleading, Mr. Foster's excellent book on Federal Procedure, Beach on Equity, and others. Excellent precedents of bills, &c., can be found in the Equity Draftsman.

Perhaps no system of pleading is more perfect than that in equity. We perhaps may except admiralty pleading. The pleadings in equity are the bill, demurrer, plea and answer and replication. The bill states the complainant's case. The demurrer lies for any defect or objections patent on the face of the bill. The plea sets up some matter not in the bill, operating as a defense to any statement therein. The answer discloses the whole defence. The replication is a joinder in issue and though necessary, is formal.

If one demur to the whole bill, he cannot plead or answer without withdrawing or defeating his demurrer. So also having pleaded to the whole bill, he cannot answer without defeating his plea. Nor can he either demur or plead after answering. But one may demur to one part of a bill, plead to another and answer as to the rest. Or in his answer he may set up the same defence he could have made by demurrer or plea or both, and crave and obtain the same benefit of objection as if he had formally demurred or pleaded. The bill is usually verified on oath. The demurrer or plea must be certified by counsel, that in his opinion it is well founded in point of law and must be supported by affidavit of the defendant, that it is not interposed for delay, the plea being sworn to as true in point of fact.

Amendments are liberally allowed. A complainant can amend as of course and without costs at any time before a copy of the bill leaves the clerk's office. If such copy has been given the defendant, he can amend on paying for him the cost of a copy of the amendment. If the amendments

are numerous, he must furnish a copy of the whole bill as amended.

After a demurrer, plea or answer has been put in, complainant can amend on motion to and by leave of any judge of the court on such terms as the judge may impose without notice to the other side if he has not filed his replication. If he wants to amend after replication, he must give notice of his motion and get leave of the judge, submitting an affidavit that his motion is not for delay and getting his amendment on the terms the judge may impose.

A bill in equity is the statement of his side of his case by a party seeking aid of the court. Strictly it has nine parts, or subdivisions. In practice some of these are omitted. It opens with:

1. The address, to The Honorable Judges of the Circuit Court of the United States for the Eastern District of Virginia.

2. Then it gives the names, &c., of complainant, complaining show unto your Honors, John Smith and James Jones, citizens of the State of New York, and residents of the said State. Then it goes on and states the claims of complainants as simply and as tersely as is consistent with clearness. A good rule in preparing these statements is this: imagine that you are stating all the facts of a case to some legal friend for his opinion in the form of a letter to him; and do it so that he can understand and see every material fact in the case.

This statement having been made, sometimes it is followed by a charge that the defendants, whose names are mentioned in your statement (and by the way, after whose names when first mentioned, must follow the averment of their citizenship and residence, as for example, citizens of the State of Virginia and residents of the city of Petersburg), that these defendants have combined and confederated with certain parties unknown, &c. This, however, can be omitted. (Equity Rule 21). After that there used to come and may now at times come, what is

called the charging part of the bill; that is to say, a detailed statement of the various pretences set up by the defendants as the reason or excuse for denying or refusing the plaintiffs' claims, it was done by way of anticipating and answering the defence. This may be omitted. (Rule 21.) Then comes the averment that complainant is without remedy save in a court of equity in which matters of this sort are cognizable and relievable. This is not essential either, (Rule 21). Then come such questions as complainants may desire to put to defendants, to obtain their acknowledgment of certain facts and to purge their consciences generally, technically known as interrogatories.

This used to be very important when parties to a cause could not be witnesses therein and the interrogatories were used as means of discovery. They are not used freely now for the reason above intimated, and because the answers on oath to such questions cannot be gainsayed except by the oath of two witnesses or by the oath of one and corroborating circumstances. The more general practice is to avoid this by not requiring the answer to be verified by oath. See Rule 41 as amended. Waiver of the oath must be express. *Conly* v. *Nailor*, 118 U. S., 134. Then comes the prayer for the relief sought. This requires care so that it may be expressed clearly and distinctly. If extraordinary remedies are asked, such as for an injunction or appointment of a receiver or anything like this, a prayer to this effect comes in here, and the whole ends with a general prayer for such further relief as to the court may seem best in equity.

Having thus put the court in possession of his case and what he asks in the way of relief, he prays for process to bring the defendant into court. This is essential. Rule 23 in equity, Story Eq. Pl., § 44; 1 Daniel, ch. (6th Am. Ed.), p. 391 and note 3. It is called a subpœua *ad respondendum*, and is the equivalent of the writ at common law, or the summons

of the modern system, by which the defendants are summoned into court and are instructed when to come and make defence.

This subpœna cannot issue until the bill is filed in the clerk's office, and must be served on the defendant personally, or by leaving a copy thereof at his usual place of abode with some adult member of or resident in the family. The marshal or his deputy or some one specially authorized must serve this process. It is returnable to a rule day, the first Monday in each month, the rule day at least twenty days after the date of the service of the process.

Having been served with process the defendant must enter his appearance with the clerk on the rule day to which the subpœna is returnable. He should then get a copy of the bill and must file his defence thereto on or before the next succeeding rule day. If he fails to do this the bill is taken *pro confesso*, and the case is thereupon under the control of complainant.

If he makes defence, and the bill on its face shows a want of equity; that is, does not state a case for equitable relief, he can enter a general demurrer, or if there are defects patent on the face of the bill, he can demur because of these. Or if there be any facts outside of those mentioned in the bill, he may enter his plea setting them up as defence to the bill. If a demurrer or plea be interposed the complainant must set it down for argument on the rule day on which it is filed, or the next succeeding rule day, otherwise he will be held to admit its sufficiency, and the bill is liable to be dismissed.

If the defendant prefer to make a full defence he will file his answer to the bill, stating his grounds of defence. If the bill require him to answer certain interrogatories he must answer them, and unless the bill waive his oath to his answer, he must verify it.

The oath in the courts of the United States must be taken either before the clerk of the court, or a United States commissioner, or a notary public.

The answer having been filed, the defendant has the same right of amending it as the complainant had to amend his bill, and on the same conditions.

When it has been filed the complainant must examine it, and if he deem it insufficient he can file his exceptions thereto by the next rule day. If none be filed, and if the time be not extended by a judge, the answer stands.

Then the complainant, on the rule day next after that on which the answer is filed, must file his replication. This is as has been said, a formal joinder of issue. Unless it is filed the bill is liable to be dismissed, unless the judge will allow it to be filed *nunc pro tunc*. Rule 66.

The case is now at issue. If the statements of the bill and those of the answer cover the case sufficiently, it can be heard on bill and answer. But if testimony is needed in the case, such testimony can be taken orally before an examiner appointed by the court after reasonable notice. The witness must be produced before the examiner, and his testimony is taken on examination and cross-examination, and is recorded by the examiner, or, if parties consent, by a stenographer or typewriter, and is signed by the witness. If any question be excepted to, the examiner notes the exception, and reports the testimony. When the evidence is closed the examiner transmits the original depositions to the clerk. Testimony of absent witnesses can be taken by commission, the interrogatories and cross-interrogatories having been first prepared in writing and attached to the commission. The testimony of aged and infirm witnesses, or of one about to leave the country, or of one living more than one hundred miles from the place of trial, may be taken by deposition *de bene esse*. This is taken orally before any notary public, after reasonable notice to the other side. The testimony, when taken, is sealed by the notary public, and either handed by him to the clerk or sent by mail, in a package sealed by him, and with the name of the case

endorsed on it. Every provision of the act of Congress in this regard must be strictly pursued, else the testimony cannot be read. Nor can it be read if the witness subsequently appear in court so that he can be regularly examined.

All the testimony being in, the cause can be heard on the pleadings and evidence. The court usually fixes a time when all the evidence must be taken, giving so many days to the complainant to open his case, so many to defendant to rebut, and a few days to complainant to reply. If no such time is fixed by the court, all the evidence on both sides must be taken in ninety days from the filing of the replication.

The cause being ready now for a hearing, comes before the court. In ordinary cases it can be heard and decided. Sometimes, however, there arises in the case a dispute on a matter of law, the decision of which is necessary before the equities can be settled, and sometimes a dispute on a matter of fact so complicated, and sustained by evidence so contradictory, that the court is unwilling to decide it. In cases of the first kind the case may be suspended in equity, and the parties are instructed to go into the law court and have the point decided. A familiar illustration of this is an action for partition of land in which the question of title in the land is made. Courts of equity do not ordinarily decide such questions. So they suspend the equity case, and send the parties to the law court, with instructions to try in that court, before a jury, the question of title. When such trial has been had the result is reported to the equity court, and it then goes on and disposes of the case. Another example is a question of fact, to which witnesses on both sides swear, contradicting each other. The court of equity prefers that such contradiction be solved by a jury as the most appropriate tribunal. It orders the parties to make up an issue and try it in the law court before a jury, or in some instances, it organizes a jury for itself and submits the case to it. *Wilson* v. *Riddle*, 123 U. S., 608. Where the

parties are ordered to go into the law court and there get a determination of their case, the court of equity is bound by the decision. When the court directs them simply to try an issue of fact before a jury in the law court, or in its own court, it is not bound to accept the verdict of the jury, but may try it before another jury or decide the issue for itself. The most common step in a cause in equity is the reference to a master. He is directed to make such inquiry as the court may desire, and has not the time or the opportunity of making, and the master must report the result of his inquiry to the court. This inquiry may be of the most searching character. Especially is it used in matters of account, the dealings of trustees, guardians, and executors; the relations of copartners with each other, and minute details of this character. The master takes all the testimony bearing on the points referred to him, makes his report to the court as directed, full opportunity for exception is given so as to test the accuracy of the report. The master cannot pass upon all the issues in an equity case; nor can the court refer to him the decision of a case except by consent of parties. He simply reports facts, his findings are simply advisory, and the court may reject them in whole or in part. *Kimberley* v. *Arms*, 129 U. S., 512; *Boesch* v. *Graff*, 133 U. S., 697. The cause is then heard, leading to a final decree.

It will be seen from this brief sketch of a suit in equity, how carefully every step is designed for obtaining the most complete justice in a case before the court. The complainant prepares his complaint and files it. Any defect he may have unwittingly made in his statement can be amended by him with full opportunity. The opposite party can then provide himself with a copy of the complaint and can examine it carefully for at least one month. If he see any omissions or insufficient statements of fact or errors in the principles of equity, he can by his demurrer or plea have these corrected and can force amendments, or he can put in his answer which

in time is submitted to the criticism of the complainant who can except to it until it is perfected. The full case on both sides thus being before the court, it can have them thoroughly investigated either before the court or by a jury or by the help of a law court or by its own officer, known as the master. Complete and full justice can thus be secured. More than this. If a defendant brought into a court of equity, conceives that out of the facts stated or transactions before the court, he is entitled to some relief as against the complainant or any one or more of his co-defendants, he can file what is known as a cross-bill, in which he becomes an actor and to which he can make defendants the complainant and his co-defendants, but no one else. A cross-bill must always be filed when a defendant does not only stand on a denial of of the complainant's case, but seeks some affirmative relief himself.

If any circumstances occur after the bill filed, which in any respect changes the aspect of affairs existing at the time of the filing of the bill, it can be brought before the court by supplemental bill, setting it forth and connecting it with the other matters in the original bill. And if any parties die pending the suit, if they are among the plaintiffs, the death is suggested on the record, or if relief is sought against the representatives of deceased defendants theseare made parties to the suit by bill of revivor.

Decrees in equity rank as judgments, and are enforced by writs of attachment, or if defendant cannot be found by writ of sequestration or a writ of assistance to enforce delivery of possession. In practical experience these writs are not needed.

Courts of equity are always open for all purposes preparatory to the hearing of causes on their merits and for executing decrees.

CRIMINAL JURISDICTION.

Circuit courts of the United States have jurisdiction over all offences against the statutes of the United States, unless it

be expressly provided to the contrary. They have concurrent jurisdiction with the State courts over all crimes and misdemeanors committed in forts, arsenals and other places within the States, ceded for public purposes to the United States, where this jurisdiction is reserved by the ceding States. The provision upon this subject is found in section 5391 of the Revised Statutes of the United States as follows:

"If any offence be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offence is not prohibited or the punishment thereof is not specially provided for by any law of the United States, such offence shall be liable to and receive the same punishment as the laws of the State in which such place is situated now in force provide for like offence when committed within the jurisdiction of such State, and no subsequent repeal of any such State law shall affect any such prosecution in any court of the United States. They have exclusive jurisdiction over all capital felonies committed on the high seas and outside of the limits of any State, and concurrent jurisdiction with the district court of all crimes and misdemeanors not capital committed on the high seas and outside the limits of any State." You will find the offences punishable in the circuit courts as crimes detailed in §§ 5339–5391, Revised Statutes of the United States.

These are the provisions with regard to the trial of crimes in United States Courts:

1. All crimes shall be tried in the State and district where the crime was committed (6th Amendment of the Constitution of the United States), and all capital offences shall be tried in the county where the offence was committed where that can be done without great inconvenience. Section 729, Revised Statutes.

2. The trial of all offences on the high seas or elsewhere out of the jurisdiction of any particular State or district shall be

in the district where the offender is found or in which he is first brought. Act April 30, 1790, 1 Statutes at Large, 114.

3. Where an offence is committed against the United States, begun in one district and completed in another, it can be tried and punished in either district. Section 731, Revised Statutes of the United States.

There are no common law crimes triable before their courts (*Pettibone* v. *The United States, 148 U. S., 197*), but in construing the statutes creating crimes and misdemeanors the common law definitions apply. Every offence, the punishment of which is capital or infamous, must be presented by a grand jury on indictment before the party accused can be tried. 5th Amendment of Constitution of the United States. An infamous offence is one in which the judge has the right in his discretion to imprison the defendant in a penitentiary with or without hard labor. And as under provisions of law persons sentenced for more than twelve months' imprisonment must be sent to some penitentiary designated by the attorney-general, it would seem that every offence for which the revised statutes provide as a maximum of imprisonment, more than twelve months, is an infamous crime. (*Macklin* v. *The United States, 117 U. S., 352; In re Classen, 140 U. S., 200*).

Offences not infamous can be tried on information by the district attorney. Section 1022, Revised Statutes of the United States. The incidents of trial are the same as in the State courts, except that in all cases below felonies, the accused can challenge peremptorily three jurors and the United States three, and in felonies, except treason and capital felonies, the accused has ten and the United States five challenges. In treason and capital felonies, the accused has twenty and the United States ten challenges. Section 819, Revised Statutes of the United States. If there are several defendants tried together, they have together the same right of challenge as but one would have had. Section 819, Revised Statutes. In every

court of the United States a defendant charged with crime may testify in his own behalf. If he avails himself of this privilege, he then becomes subject to the rules controlling any other witness. If he does not, no allusion to his non-action can be made in the progress of the case or in the charge of the judge to his disadvantage. See Statutes at Large of the United States, 30.

Formerly the circuit courts had an appellate jurisdiction from the district courts. This seems to have been practically abolished, except, perhaps, in some of the few unfinished bankruptcy cases. It has been doubted whether a defendant can consent to be tried by a jury less than twelve in number. (*Pope Manufacturing Co.* v. *Gormelly*, 144 U. S., 234.) And it has been decided that the prisoner in a trial for felony cannot waive the right to be personally present. *Lewis* v. *the United States*, 146 U. S., 370.

DISTRICT COURTS.

There are sixty-nine judicial districts in the United States. One in each of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, West Virginia, Indiana, Minnesota, Kansas, Colorado, Nevada, Nebraska, Montana, North Dakota, South Dakota, Wyoming, Washington, Oregon, Idaho, Alaska. Two in each of the States of Pennsylvania, Virginia, North Carolina, Florida, Georgia, Louisiana, Michigan, Ohio, Illinois, Wisconsin, Arkansas, Iowa, Missouri, California. Three in each of the States of New York, Texas, Tennessee, and Alabama.

There are two districts in each of the States of Mississippi and South Carolina, but there is only one district judge for each State. In Alabama and Tennessee there are three districts, but only two district judges. Every other district is presided over by a district judge.

JURISDICTION.

The district courts of the United States have jurisdiction:

1. Of all crimes and offences cognizable under the authority of the United States, the punishment for which is not capital, committed within their respective districts or upon the high seas. The only exception to this is an offence defined in section 5412, tampering with official land records of the State of California, which presumably can only be tried in the circuit court.

2. Of all cases arising under any act for the punishment of piracy where no circuit court is held in the districts of such courts.

3. Of all suits for penalties and forfeitures incurred under any law of the United States. This jurisdiction is exclusive.

4. Of all suits at common law brought by the United States or by any officer thereof. Persons holding office under any act of Congress are officers within this clause. Such as receivers of national banks appointed by the comptroller of the currency. *Platt* v. *Beach*, 2 Ben., 363.

This term officer of the United States is defined by the Supreme Court to be "a person in the employment of the government, who holds his place by virtue of appointment by the President, or of one of the courts of justice or heads of departments, authorized by law to make such an appointment." *United States* v. *Moriat*, 124 U. S., 307.

5. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax, any real estate owned by the delinquent or in which he has any right, title and interest.

6. Of all suits for the recovery of any forfeitures or damages under section 3490 of the Revised Statutes of the United States, and such suits may be tried in any district court within whose jurisdictional limits the defendant may be found. The

cases referred to are these: It is made a serious crime by section 5438 to present any forged, fictitious or fraudulent claim against the United States, punishable by heavy fine or imprisonment. In addition to this punishment the person guilty of this crime forfeits to the United States the sum of $2,000 and such damages as the United States have sustained. Suits for these can be brought in the district court.

7. Of all causes arising under the postal laws of the United States.

8. Of all civil causes of admiralty and maritime jurisdiction. This will be particularly discussed hereafter.

9. It had jurisdiction over property captured during the late war.

10. Of all suits by the assignee of any debenture for drawback of duties issued under any law for the collection of duties against the person to whom such debenture was originally granted or against any indorser thereof, to recover the amount of such debenture.

The debenture here spoken of is this: Any person importing into the United States, dutiable articles, which he intends to re-export, is entitled to a drawback or repayment of the duties so paid upon the exportation. He upon satisfying the collector of his *bona fides* and on payment of the duties, gets from the collector a debenture, that is an acknowledgment in writing, that the United States is indebted to him in the sum of money so paid, less proper allowances. These are made assignable and are the papers here referred to.

11 and 12. All suits at law or in equity for damages against or for securing civil rights.

13. Of all suits to recover possession of any office, except that of president of the United States or vice-president, representative or delegate in Congress, or member of a State legislature, when the sole question touching the title to such an office arises out of the denial of the right to vote to any citi-

zen offering to vote on account of race, color or previous condition of servitude, provided that the jurisdiction shall extend only so far as to determine the right of the party to such office, by reason of the denial of a right guaranteed by the Constitution and secured by law.

14. Of all proceedings by the writ of *quo warranto* presented by any district attorney for the removal from office of any person holding an office except as member of Congress or of a State legislature, contrary to section 3 of XIV. Amendment of the Constitution of the United States. This section relates to political disability arising out of the late war between the States.

15. Of all suits brought by an alien for a tort only, in violation of the law of nations or of a treaty with the United States.

16. All suits against consuls and vice-consuls except for tort just as described.

It will be seen from this enumeration that the district courts have a very wide jurisdiction. They are in fact the courts through which the government enforces its customs' revenue law, internal revenue laws, postal and pension laws and all the details of administration either civil or criminal. The greatest volume of business passes through them, and the judges who preside in them are the most laborious judges, with some few exceptions, in the whole Union.

In the exercise of its common law and criminal jurisdiction the court always sits with the jury. And in civil cases at law the practice and pleadings and mode of trial with the incidents of trial conform to the mode of procedure, practice and pleading in the State court. All infamous crimes, and you will remember that all crimes in these courts are infamous where the statute gives the judge the right to sentence for imprisonment longer than twelve months, can only be tried on indictment and presentment by a grand jury. All other offences can be tried on information by the district attorney.

The right of challenge is the same as in the circuit court, three on each side for offences below the grade of felony; in felonies five to the United States and ten to the defendant. If several are tried together, they all count as one in the exercise of the right of challenge.

In all cases involving the question of the jurisdiction of the courts, either civil or criminal, the decision of the court can be only reviewed in the Supreme Court of the United States. The single question of jurisdiction is presented, none other.

In capital and infamous cases also the judgment of the court can be corrected only in the Supreme Court of the United States. The only capital cases, however, which can come up from this court are those of piracy, when there is no circuit court to take jurisdiction.

All other cases are reviewed in the circuit court of appeals from the circuit to which the district court belongs.

The modes of correction are writs of error in law cases; appeals in equity and admiralty cases.

In addition to this common law jurisdiction, the district courts are also courts of admiralty. Although these two classes of jurisdiction are vested in the same tribunal they are as distinct from each other as if they were vested in different tribunals, and can no more be blended than a court of chancery with a court of law. (*The Sarah*, 8 Wheat., 391).

COURTS OF ADMIRALTY.

The pleadings, practice, principles, and administration of courts of admiralty differ so much from the courts of law, and the jurisdiction of these courts is so large and of such vast importance to the interests of this country, that the subject will be treated as fully as time will allow.

It is perhaps the most perfect system of jurisprudence. The supreme effort is to get at the real equities of the case, and to ascertain what justice demands. Free from technicali-

ties, the parties come into court, and every facility is afforded for a plain statement of their claims or defences. So in making its decree the court can have all the information needed. The rules of pleading and the principles controlling the cases are found in the civil law, the ancient usages of the sea, the Statutes of the United States, and the decrees and rules of the Supreme Court. And its decrees are based on broad principles of equity and fair dealing. One instance of many can be given. At common law in an action for injuries caused by the negligence of the defendant, if it appear in the evidence that the plaintiff himself was negligent, he cannot recover if his negligence contributed to the injury, although the injury may be very great and his contribution may be small. In admiralty the rule is different. If both parties contribute to the injury, both bear the damages. Generally these are divided; that is each party bears one-half the damages. The rule is now being relaxed, and the better opinion is that the damages be apportioned between the parties according to the degree of negligence.

The jurisdiction in admiralty as distinct from the common law has been administered for many centuries. Its origin in England is in doubt, but it certainly existed during the time of Richard, the Lion Hearted. On his return from Palestine he brought with him the system of laws governing admiralty cases, known as the laws of Oleron. You will find a learned and exhaustive discussion of this topic by Mr. Justice Story in *DeLovio* v. *Boit*, 2 Gallison, 398, to be found also in Federal Cases, of the West Publishing Company, No. 3, 776. Lord Coke was specially hostile to the courts of admiralty, and he waged war against them as well as against courts of equity. The contest has been carried on in England from his time to the present between the courts of common law and these courts, in which, however, the admiralty courts have steadily won silent victories. On the Continent they have existed beyond the

memory of man. Before the Revolution of 1776, there were admiralty courts in nearly all the colonies, and practice and procedure in admiralty were familiar to all the lawyers of that day. The Constitution declared that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the great judiciary act of 1789 conferred this jurisdiction on the district court exclusively. The language of the statute now of force on this subject is in these words:

Eighth. "In all cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, when the common law is competent to give it, and of all seizures on land and on waters, not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in particular cases in which jurisdiction of such causes and seizure is given to the circuit courts, and shall have original and exclusive cognizance of all prizes brought into the United States."

It will be noticed that the jurisdiction in admiralty is conferred on these courts in all cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it. This saving clause, however, was not intended to withdraw such cases from the cognizance of the admiralty courts, but simply to give a concurrent jurisdiction over them in common law courts. (*New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 Howard, 344). Either court can take jurisdiction and give relief according to its own methods.

The jurisdiction of courts of admiralty extends over the high seas and the navigable waters of the United States. The term high seas needs no interpretation. It covers all the great oceans and seas of the globe. The navigable waters of the United States are that part of the high seas, adjacent to the coasts over which the United States has a jurisdiction as

against other nations, and all harbors, lakes, rivers, streams in the United States, used or capable of being use for the purposes of trade and commerce, including the canals. *Ex parte Boyer*, 109 U. S., 629. In England the jurisdiction of the admiralty is confined to the high seas and to those streams in which the tide ebbs and flows, and in these only, within this ebb and flow.

This restriction was followed in this country for many years. But as the great West opened up, and the tide of population surging over the Alleghanies and the Blue Ridge, invaded that immense region, drained by the Ohio and Mississippi rivers and their great tributaries, and especially when the shores of the great lakes were inhabited, and large fleets covered their waters, it was found impossible to keep within the narrow definition of navigability imposed by the peculiar condition of the small and short rivers in England. Waters were declared navigable, which were or could be navigated. The Supreme Court of the United States in *The Gennessee Chief*, 12 Howard, 450, with an excellent opinion by Taney, chief justice, followed by *The Daniel Ball*, 10 Wall, 557, and *The Montello*, 20 Wall., 43, which are commended to your examination, and which have been confirmed again and again, swept away all narrow restrictions, and established the jurisdiction which has been stated.

Courts of admiralty are prize courts and instance courts. As prize courts, they administer international law, the law of nations (Henry's Admiralty, page 83), and they exercise the jurisdiction in time of war, in the condemnation and sale of prizes captured, and in the distribution of the proceeds. This jurisdiction is exclusive. They have no jurisdiction over prizes made for foreign vessels.

As instance courts, they exercise jurisdiction under the municipal law, as for example, over maritime contracts, and over maritime torts. The jurisdiction over contracts is dependent

on the subject matter of the contract. They must be maritime. Jurisdiction over torts is dependent on the locality. The tort must have occurred on navigable waters.

MARITIME CONTRACTS.

Here are some of the definitions given of the term a maritime contract:

Maritime contracts are such as relate to commerce and navigation. (*Young* v. *The Orpheus*, 2 Cliff., 29).

The term is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. (*The Jefferson*, 20 How., 393).

To be a maritime contract it is not enough that the subject matter of it, the consideration, the service is to be done on the sea, it must be in its nature maritime. It must relate to maritime affairs. It must have connection with the navigation of the ship, with her equipment or preservation, or with the maintenance or preservation of the crew, who are necessary to the navigation and safety of the ship. Thus a carpenter, a surgeon, a steward, though not strictly mariners, may all sue in admiralty for their wages, as maritime contracts, because they contribute in their several ways to the preservation and support of the vessel and her crew. *The Farmer*, Gilpin, 531.

It is better to give examples of what are maritime contracts. The term has been greatly enlarged in this country, and many contracts are included in it, which in England would be excluded.

1. Mariners' wages are all subjects of maritime contract, and of high rank. Ships are built for the purpose of voyaging, not to lie in port. Whatever contributes to this purpose is encouraged, and seamen and others whose services are necessary to subserve this purpose are objects of care to admiralty courts. Indeed, they are the wards of admiralty. The court is always open to listen to and adjudicate their claims, to arbi-

trate all disputes between them and the master, and the owners of the ship, and to protect them from fraud and oppression of all kinds, and from any quarter. Seamen and men of their class have a lien on the ship for their wages. But the master has not in this country, although many other maritime nations give such lien to him. *The Orleans* v. *Phoebus*, 11 Peters, 175.

2. Contracts of affreightment and of carriage of passengers. This is the purpose for which vessels are built and used, and it also is protected in admiralty. Contracts of affreightment are either by charter party or bills of lading. A charter party is an instrument whereby the owner of a vessel hires the vessel to another, who is called the charterer. Sometimes the whole vessel is hired, so that the charterer becomes the owner *pro hac vice*, engages and pays the crew, furnishes all supplies, pays all expenses. At other times only the freight room in the vessel is hired, the owner retaining possession and control of the vessel, and having thus a right to retain cargo until the money for the hiring has been paid.

A bill of lading is used where the owner of the property shipped is neither the owner nor charterer of the vessel. It is evidence of the receipt of the goods shipped, and contains the contract on which they are carried and to whom they are to be delivered. As you well know the contract of a common carrier at common law, and ships and vessels are almost always common carriers, is that of an insurer. He is liable for all casualties "not the acts of God or the king's enemies." The liability, however, may be modified by the contract of carriage in the bill of lading. In England this can be carried so far as to excuse the carrier from the negligence of his servants, even the negligence of himself.

In this country and in the Federal courts, certainly, no common carrier can by any contract exempt himself from liability for the negligence of himself or of his servants, although he can modify it in almost every other respect. *New York Cen-*

tral Railroad Company v. *Lockwood*, 17 Wallace, 357; *Inman* v. *South Carolina Railroad Company*, 129 U. S., 128; *Grand Trunk Railway* v. *Stevens*, 95 U. S., 655; *The Montana*, 129 U. S., 397.

By an act of Congress no owner of a vessel carrying goods is responsible for destruction of cargo, or any of it, by fire not caused by the design or neglect of the owner. Section 4182, Revised Statutes.

3. Marine policies of insurance are maritime contracts. *Insurance Company* v. *Dunham*, 11 Wallace, 1.

4. Bottomry and respondentia bonds are also. Bottomry bonds are so called because they create a lien on the vessel herself. They are bonds executed by the master or owners to pay expenses of repairs and new equipment absolutely necessary for a vessel, which has met on her voyage with disaster and has been compelled to seek refuge in some port of safety. *Delaware Mutual Safety Company* v. *Gossler*, 96 U. S., 645; *The Grapeshot*, 7 Wall., 563. These bonds constitute a claim on the vessel contingent on her safe arrival in port.

Respondentia bonds are similar to bottomry bonds in this. They can only be given in a matter of extreme necessity to pay for such repairs and equipment, and they cover the cargo, and not the ship. Maritime law clothes the master with this power. It rests on the assumption that ship and cargo are both interested in one common purpose, and that is in reaching the port of destination. To this end they should contribute when it becomes absolutely necessary. *Thomas* v. *Osborn*, 19 How., 22. The master in control of the ship and in charge of the cargo represents the owners of both. In an emergency of the kind described he acts as their agent. *Thomas* v. *Osborn*, 19 How., 22; *The Julia Blake*, 107 U. S., 418. But if it appears that in the port to which the vessel has gone there can be obtained another vessel which could carry the cargo forward, and if it be for the interest of the owner of the cargo to

do this, instead of waiting for the repair of the vessel, then the master has no right to execute a bond on the cargo without express consent of the owner. *The Julia Blake.*

This rule originated at a time when steam and the telegraph were unknown; when ships sailed on distant voyages into remote countries, and owners of vessel and the cargo could not be consulted when emergencies arose, so masters of ships had great powers.

5. Somewhat similar in principle to this is the relief afforded in admiralty in cases of jettison and general average. A jettison occurs when it becomes necessary in order to save a vessel in storm, hurricane or any threatened marine disaster to lighten her by throwing overboard any part of her cargo or equipment. This is done for the benefit of the vessel and of all her cargo, and the owner of the property jettisoned has the right to call upon the owners of the property saved by the jettison to contribute to the loss incurred for the common safety. This is analagous to the implied *assumpsit ex equo et bono.*

General average is the mode of enforcing the right which the owners of the vessel have to call upon the owners of the cargo, to assist them in paying for all expenses incurred by the vessel in repairing disasters caused by acts of God and other inevitable casualties, necessary to completion of the voyage. Thus a vessel meeting with a severe gale in which she is damaged, has to put into port and repair. This can be made the subject of general contribution, technically called general average. Or she may be found afire and has to call in assistance to put out the fire. The expense of this is subject to general contribution. It proceeds upon the same general principle as jettison, and agrees with the maxim "*qui sentit commodum sentire debet et onus.*"

You will find a full and excellent discussion and explanation of what is general average in *Rallie* v. *Troup,* 157 U. S.,

380. That case quotes the language of Mr. Justice Grier with approval in *Barnard* v. *Adams*, 10 Howard, 270, and which with one addition is almost perfect in its explanation.

"In order to constitute a case of general average, three things" (I think four things) "must concur."

1st. A common danger, a danger in which ship, cargo and crew all participate ; a danger imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2nd. There must be a voluntary jettison or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril or in other words, a transfer of the peril from the whole to a particular portion of the whole.

3rd. This attempt to avoid the imminent peril must be successful.

4th. Which I venture to add :

The sacrifice must be made under the direction of the owners of the vessel and cargo or by the commanding officer (Master or in his stead the Mate) of the vessel, acting as the agent of vessel and cargo.

6th. Salvage in another subject of maritime jurisdiction.

Salvage is the reward for services voluntarily rendered by persons under no legal obligation to do so, to property exposed to marine disaster. It is very much favored in admiralty and the compensation is measured not as a *quantum meruit* only, but as a premium given by way of inducement for others in like circumstances to do likewise. The books are full of cases discussing this matter of salvage.

Mr. Justice Clifford, whose decisions on all questions of admiralty law are of very high authority, lays down this proposition in *The Blackwall*, 10 Wallace, 13.

Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the salvage award.

The labor expended by the salvors in rendering the salvage service.

The promptitude, skill and energy displayed in rendering the service and saving the property.

The value of the property employed by the salvors in rendering the service and the danger to which such property is exposed.

The risk incurred by the salvors in securing the property from the impending peril.

The value of the property salved.

The degree of danger from which it was rescued.

When all of these elements concur the reward is very large. It is graduated by the absence of one or more of the ingredients. Judge Wallace of the 2nd circuit, expresses the law in this way, in *The Baker*, 25 Fed. Rep., 774. Neither the value of the property imperiled, nor the exact *quantum* of service performed is a controlling consideration in determining the compensation to be made for salvage services. The peril, hardship, fatigue, anxiety and responsibility encountered by the salvors in the particular case, the skill and energy exercised by them, the gallantry, promptitude and zeal displayed are all to be considered and the salvors are to be allowed such generous recompence, as will encourage and stimulate similar service in others."

Mr. Justice Bradley, in a celebrated and oft quoted case, *The Suliote*, 5 Federal Reports, 99, uses this language:

"Salvage should be regarded in the light of compensation and reward and not in the light of prize. The latter is more like the gift of fortune conferred without regard to the loss or suffering of the owner who is a public enemy. Salvage is the reward granted for saving property of the unfortunate and should not exceed what is necessary to insure the most prompt, energetic and daring effort of those who have it in their power to furnish aid and succor. Anything beyond this would be

foreign to the principles and purposes of salvage. Anything short of this would not secure its object. The court should be liberal but not extravagant, otherwise that which is intended to be an encouragement to rescue property from destruction, may become a temptation to subject it to peril.

It is not necessary that there should be a contract in advance to render salvage services. Indeed most frequently there is no contract. But the existence of a contract entered into without compulsion or duress, will not affect the service, only the courts exercise an equitable jurisdiction with respect to such an agreement and will set it aside if inequitable in its origin.

You will see an excellent case on this subject in *The Waverly,* 3 Law Reports, (Eng.) Admry. & Eccl., 378.

The salvor is entitled to hold possession of the property saved until he has been compensated. But favored as he is in admiralty, his own conduct is observed and if he be guilty of fraud, dishonesty or other impropriety, he will forfeit his award in whole or in part. *The Bello Corrunls,* 6 Wheat., 152; *Houseman* v. *The North Carolina,* 15 Peters, 40.

7. Courts of admiralty also take jurisdiction over contracts for the ransom of a vessel captured.

8. And over surveys of her to ascertain her actual condition. So as to determine whether she can complete her voyage or not.

9 and 10. And also they entertain suits by owners of vessels unlawfully deprived of their possession by co-owners, called possessory actions, and suits to try the title to vessels, called petitory actions. Possessory actions are peculiar. Most frequently a vessel is owned by several parties, each owning a fraction in her. These ownerships are entirely distinct and have none of the elements of partnership. Now vessels must be going on voyages. They are meant for this Not be tied up at piers or to lie at anchor. If owners do not agree as to

what voyage the vessel shall go on, courts of admiralty adjust the dispute. The majority in interest are allowed to prevail, but they must give the minority security for the return of the vessel in good order and condition. If, however, the dispute be whether the vessel be employed or not, and the majority do not wish her to be employed, the court will allow the minority to employ her on giving similar security. *The Orleans* v. *Phoebus*, 11 Peters, 175. In either of these cases the owners employing the vessel alone get the profits of the adventure.

There is a class of contracts partaking of a maritime character, but not under maritime law, nor protected by the maritime lien. These are contracts under which supplies, materials, repairs, and labor are furnished to a vessel in her home port; that is to say, the port in which she is registered, in which her owners reside, from which she hails. The persons who furnish these supplies, materials, repairs, and labor are known as material men. The material men who deal with foreign ships have by the law maritime a lien on the ship and all her furniture for the materials, supplies, labor, and repairs furnished her. The reason for this is plain. As we have seen the purpose of ships is to make voyages, and the maritime law gives every inducement to aid in this purpose. When a foreign vessel enters a foreign port in need of materials, supplies, and repairs, or any of these, she would not be able to obtain credit in the names of her owners, because there is no way of ascertaining, with any degree of certainty, who are the owners; and if there were, whether they are responsible or not; and even if they were responsible, still persons would hesitate to credit them, as there would be no way of enforcing the demand. The master also is a stranger, and he can scarcely hope for credit. To meet this constantly occurring necessity, the maritime law treats the foreign vessel herself as the contracting party, and makes her liable for any debt incurred for these necessary purposes. *The Kalorama*, 10 Wall., 204. Unless it

can be shown that the credit was given wholly to the owners, or to the master. The burden of proof of this is on the ship. *Insurance Company* v. *Baring*, 20 Wall., 159. Her liability is secured by the maritime lien, and will be enforced in admiralty. But the same reason does not exist in the case of a domestic vessel in her home port, where her owners or her master are well known, and the reason ceasing, the rule also ceases.

There is no maritime lien for material men in a home port. But, to promote commerce, nearly all of the States which have harbors or ports, or own shipping, have enacted laws which, under certain prescribed conditions, give to material men in home ports a lien on the vessel, similar in kind to the lien given by maritime law on foreign vessels. These domestic liens do not rest for their sanction on the law maritime, and are therefore not maritime liens. But as proceedings *in rem* are exclusively cognizant in admiralty, and these domestic liens cannot be enforced except by proceedings *in rem*, and as a necessary result, their enforcement would lead to a marshalling of liens, the Supreme Court of the United States, in its decisions and by a formal rule, permit the district courts to take jurisdiction in such cases, and to enforce the domestic liens. (*Meyer* v. *Tupper*, 1 Black, 572). You will see this whole matter discussed and fully explained in the *J. Rumbell*, 148 U. S. p. 1. The reason for this aid to these domestic liens by admiralty is the close resemblance they bear to the maritime lien for the same subject matter.

But admiralty has no jurisdiction to enforce a mortgage of a vessel, as this is not a maritime contract, and does not create a maritime lien. *Bogart* v. *The John Jay*, 17 How., 399. The most that the court will do in these cases is to permit a mortgagee to intervene by petition in a cause in which a vessel is ordered to be sold, and if there be any surplus proceeds, after paying all maritime and their domestic liens of material men,

this surplus will be paid to the mortgagee, just as had there been no mortgage, the surplus would have been paid to the owner.

Nor has admiralty any jurisdiction over a contract made on land, to be performed on the land, such as building a ship or vessel. *The Ferry Co.* v. *Biers*, 20 Howard, 393. Nor has it had jurisdiction *in rem* for injuries to a structure on the land, although such injury was caused by a vessel afloat, such as collision with a pier or bridge by vessel. She cannot be held liable *in rem*. *The John C. Sweeney*, 55 Fed. Rep., 541.

Maritime liens have priority over any mortgage.

The invariable incident of every maritime contract is that it has a maritime lien on the vessel, a lien enforcible in admialty, and enforcible nowhere else. *Edwards* v. *Elliott*, 21 Wall, 532. What maritime liens are and the mode of enforcing them will be discussed hereafter.

When next we meet we will inquire into another branch of admiralty jurisdiction—that one, marine torts.

V.

We have examined into marine contracts one subject of admiralty jurisdiction. This evening we will see what are marine torts.

The other source of jurisdiction of courts of admiralty as instance courts is marine torts. This jurisdiction depends on the locality in which the tort was committed; that is to say, on navigable waters and so within the admiralty jurisdiction. This jurisdiction over torts committed on navigable waters applies to all kinds of torts, committed anywhere, where the jurisdiction of admiralty exists. It embraces all injuries to person or property from assault and battery to collision between ships, and acts of spoliation by armed vessels.

The remedy can in any case be sought by proceedings against the person committing the tort, in what is known as

an action *in personam*, which will be spoken of hereafter. But in addition to this remedy against the person and property of the wrong-doer, the maritime law gives to some torts the assistance of the maritime lien. The proceeding is not against the wrong-doer, or the master, or the owner, but against the vessel herself, treated as an entity or a person. If a person is injured in person or property by the negligence of those controlling a vessel, he has a remedy in admiralty, against the vessel herself, which is protected by the maritime lien. The admiralty courts go farther. You are familiar with that encroachment made on the common law by what is known as Lord Campbell's act, the provisions of which are adopted in nearly every State of the Union.

At common law a personal action dies with the person and therefore when one receives an injury to his person at the hands of another and dies after or from it, no right of action survives. Under Lord Campbell's act and those acts adopted in this country following it, if one receives an injury for which he could have brought an action had he lived, and dies from it, his personal representative can bring an action against the wrong-doer for the death resulting from this injury and damages can be recovered for the benefit of those dependent on the deceased person. Admiralty will enforce this remedy by proceedings, if the law of the State in which the suit is brought gives a similar remedy in its courts. If the State statutes in addition to the right of action, give also a lien, then a maritime lien is also given in admiralty and the suit can be against the vessel, on or by which the loss of life was occasioned. But if the State statute give only a personal remedy, then only the persons causing the act or whose negligence caused the act, can be sued in admiralty *in personam*. *The Corsair*, 145 U. S., 335.

There is a class of maritime torts against which the Congress and the courts have adopted the most careful precautions

and for which the most complete remedy is provided. More than this, it is a matter of international concern. These are collisions between vessels on the high seas and in navigable waters. All the great commercial nations of the world have adopted an International Code of Regulations, binding upon all of them, which are intended to prevent the risk of collision. You will note the phraseology, not to prevent collision, but to prevent the risk of collision. This code provides in every minute detail for every possible risk of collision, by day or night, in fair weather or in fog, and clearly instructs as to the mode of avoiding such risk by the use of flag signals and sound of whistles or horns by day, and of lights, whistles and horns by night. The international regulations now in force, you will find in the Revised Statutes of the United States, section 3233. A revised and enlarged code has been prepared and is under consideration of the Great Powers. It has been assented to by this country and can be found in Supplement to the Revised Statutes of the United States, Vol. I, page 781, 26 Statutes at Large, 320. It will not go into operation until the President issues his proclamation. This awaits the action of the other powers.

Besides this there are codes adopted by the United States alone or under its authority for bays, harbors, rivers and lakes in the United States. The necessity for these codes in the narrow channels and water ways and in the broader rivers and harbors frequented by water craft is obvious.

But wide and apparently limitless as the oceans are, the path vessels take in traversing them is comparatively narrow. The course of currents, the prevalence of winds, the effort to save time and distance cause this. For example, all vessels going from this country to Europe, with few exceptions, seek the parallel of latitude as far north as is consistent with safety and on that complete the voyage. In their passages, fogs are constantly met with, the course is by night as well

as day. The dangers of collision are constant, unexpected and sudden. The utmost vigilance is required on the part of all navigators. The most strict compliance with the rules of navigation is commanded. Obedience to them is enforced in heavy damages for collisions arising from their non-observance. Non-observance raises the presumption of negligence. When a collision takes place, the vessel in fault is held bound to restore the other vessel *ad integrum*. *Williamson* v. *Barrett*, 13 How., 110. If both are in fault, both are punished by the apportionment of the damage. 17 How., *The Schooner Catherine*. This damage is secured by a lien on the vessel. If the fault be inscrutable there is no division of damages. *The Alhambra, The Grace Girdler*, 7 Wall., 196; 33 Federal Reports, 77.

Judge Curtis, in the lectures to which your attention has already been invited, mentions other torts, damages for which are protected by maritime lien. One of these is spoliation by force on the high seas or navigable waters of the United States. These may be either by pirates or armed vessels, not authorized by any recognized power, or by the master and crew or a part of a crew of a vessel, not a pirate, but on some particular occasion, committing the act of spoliation, or they may be committed by some vessel duly commissioned by the United States. In all these cases the admiralty court has jurisdiction to make restitution of the things seized and to award damages for the seizure. The court can also interfere in cases of spoliation by foreign ships, if it take place within our waters; that is to say, within one league of the shore of the United States or between any of the headlands on the coast, or *inter fauces terræ*. *Soult* v. *L'Africane*, Bee, Admiralty Reports, 207, Federal Cases, section 13179. *The Hungaria*, 41 Federal Report., 109.

The courts can also take jurisdiction of a breach of our neutrality laws by any foreign vessel.

So also all revenue seizures made on navigable waters are within the jurisdiction of courts of admiralty.

The jurisdiction of courts of admiralty has no other limit than that stated. Contracts must be maritime and torts must have been committed on navigable waters. The provision in the act of 1888, that no civil suit can be brought in any circuit or district court against any person in any other district than that whereof he is an inhabitant, has no application to suits in admiralty. One can be sued *in personam* wherever he can be served with process. (*Re Louisville Underwriters*, 134 U. S., 488).

Nor does the jurisdiction depend on citizenship. The court can in its discretion take jurisdiction over suits maritime between aliens. They may decline to do so. *The Maggie Hammond*, 9 Wall., 435.

They have jurisdiction over collisions on the high seas between vessels of different nationalities. *The Belgenland*, 114 U. S., 355.

They can entertain all suits by seamen for their wages against a vessel, whether foreign or American, and will apply to such cases the laws of the country under whose flag the vessel sails. *The Olga*, 32 Federal Reports, 329. *The Velox*, 21 Federal Reports, 479.

Now all maritime contracts and these maritime torts of collision, spoliation and the like are secured in admiralty by the maritime lien.

This term lien has a different signification at common law, in equity and in admiralty.

At common law there can be no lien without possession. It is there defined a right in one man to retain that which is in his possession belonging to another until certain demands of him, the person in possession, are satisfied. An innkeeper has such a lien on the baggage of his guest. A common carrier on the goods carried. In courts of equity the term lien

is used as synonymous with a charge or encumbrance on a thing where there is neither *jus in re* or *ad rem* nor possession of the thing. A judgment at law is such a lien. In maritime law liens exist independently of possession, actual or constructive. *Peck* v. *Jenness*, 7 Howard, 612.

The maritime lien is thus defined by Henry in his work on Admiralty Jurisprudence and Procedure, section 41.

"It is a right or privilege in the vessel to be carried into effect by legal process. Whenever a lien or claim is given on a thing by the maritime law the admiralty will enforce it by its process *in rem*, and it is the only court competent to do this. It is much more than a right to sue; it is a *jus in re* a right in the thing itself, without actual possession or any right of possession, and can be executed and divested only by a process *in rem*, and is treated as a proprietary right. It inheres in the thing itself, the vessel, accompanies it into the hands of a purchaser even without notice, is not destroyed or impaired by forfeiture of the vessel for a violation of the municipal law prior to the attaching of the lien, although such law may forfeit the interest of the owners in the vessel, and the lien is not lost by a sheriff's sale under a judgment against the owner of the lien accrued."

But it may be lost if rights of other parties have intervened.

It is a secret lien, and notwithstanding this is carefully protected.

The lien arises, as has been seen, out of contracts, services and supplies, and from torts. It has a peculiarity which distinguishes it from liens in any other jurisdiction. It is subject to all subsequently occurring liens, whether growing out of supplies furnished or services rendered to preserve the property, or for the redress of wrongs inflicted on the property of others by the *res* in which the creditor has an interest. The rule existing in courts of common law and of equity, *qui prior est in tempore potior est in jure*, does not govern in admi-

ralty cases. It is often the reverse. "The last shall be first, and the first last." Thus in cases of salvage, and of repairs and supplies, the last liability in point of time is first in point of merit as having served to preserve the very subject which supplies the lien for all. (*The Guiding Star*, 18 Fed. Rep., 267). This illustrates the broad equity of admiralty. A vessel leaves port on her voyage, certain contracts for supplies being unpaid, secured, however, by this lien which the law gives, the maritime lien. On her voyage she meets with disaster, and to complete the voyage puts into port for repairs, which are made. The claim for these repairs has precedence over the older lien, for without these the vessel, the subject of both liens, could never return to the port from which her voyage began, and the lien could not be enforced. This maritime lien can be enforced only in courts of admiralty (*Moran* v. *Sturges*, 154 U. S., 257) by what are called proceedings *in rem*.

We have seen that courts of admiralty are prize courts and instance courts. The name indicates what prize courts are. Instance courts entertain jurisdiction of cases purely civil.

There are two classes of cases in the instance courts of admiralty, proceedings *in personam*, when the claim is made against one or more individuals, and success in which would result in a personal decree, exactly like a judgment at law on a note or an account, and proceedings *in rem*. Proceedings *in rem* are against the thing, the vessel itself, which in admiralty, is always treated as if it were a person, and the institution of the proceedings puts into operation the lien. Frequently one or other of the two proceedings can be used to secure the same demand. Thus if one ships goods by a vessel, under a contract of affreightment, to be carried from one port to another, and the goods be not delivered, he can sue the owners of the vessel *in personam* in admiralty on the contract, and if he recover, can enter his decree and issue execution against their

property generally. Or he may institute proceedings against the vessel *in rem*, and enforce his maritime lien on the vessel. In such case the vessel is the only defendant. The process of the court issues against her alone. The marshal takes her into his possession, and if the party recover, he satisfies his claim out of her. In all such cases notice is given by publication to all the world of the proceedings, which may result in a sale of the *res*, and all claimants are called in to prove their demands. To this end they intervene in the suit, and the proceeds of sale are distributed according to the priority of liens. This intervention is always made by a petition formulated like a libel, setting forth the claim of the petitioner, either to a superior or equal lien, or to an interest in the proceeds. As has been often said, however, vessels are built to traverse from port to port, and not to lie idle. When, therefore, such proceedings *in rem* are instituted, and the vessel taken into custody; those interested can put in bail for her, called in admiralty a stipulation. This is a bond with surety in such amount as the court thinks sufficient for the payment of claims made against her. This bond, when approved and filed, takes the place of the vessel, and she then goes free.

The procedure in admiralty is wholly different from that of common law. It is derived entirely from the civil law; in form and substance it is governed by the practice and rules of the civil law.

The first step is the libel. The libel fills the place of the declaration or complaint at law and of the bill in equity. It is addressed to the district judge. Opens with the introduction of the name of the complaining party, called always the libelant, and states that his complaint is in a cause civil and maritime, and that the thing proceeded against is within the jurisdiction of the court, or if the suit be *in personam*, giving the names, residence and occupations of the persons sued.

It then proceeds to state the facts of the case in plain, un-

technical language, as tersely as is consistent with clearness. In technical language, the libel "articulately propounds" the facts of the case; that is sets them forth in paragraphs, so presenting them most clearly. The facts being stated the libel asks for the particular relief desired, closes with the averment that all the facts stated are true and ends with prayer for process. See Rules in Admiralty, No. 23. If the libel is *in personam*; that is against one or more individuals seeking personal relief against them, the libel prays a monition. A monition is like a writ or summons at law, directed to the defendant and telling him when and where he must answer the libel. It is made returnable at an early day, and is issued upon filing the libel, not before. If imprisonment for debt be not abolished in the State in which the libel is filed, (Revised Statutes, section 990), the libellant can also sue out an an attachment against the person of the respondent, under which he can be arrested, and held to bail. If he cannot be found his property can be attached, to be released upon his appearance and entry into bail. The bail is governed by the laws prevailing in the State in which the libel is filed.

No attachment can issue unless the libel is sworn to, and if the amount exceed $500 an order of the judge must be obtained. (Rule 7, Supreme Court, Admiralty).

If the libel be *in rem;* that is, as will be remembered, against the vessel itself, then the libel prays a warrant of arrest directed to the marshal to take possession of and hold the vessel. To obtain this the libel must be verified by oath. No warrant of arrest can issue until the libelant enters into security for costs, except in the case of seaman's wages. Nor can a libel *in personam* be filed without similar security. To the libel may be attached such interrogatories as libelant may wish the other side to answer. The libel must be signed by counsel. The monition must be served by the marshal or his deputy. When a warrant of arrest is issued the marshal

takes the vessel into actual custody. The owner of the vessel, or some one acting in his behalf, usually the master, if he wishes to defend, enters an appearance and files his claim. He then can stipulate; that is to say, gives bond for the vessel if he wishes. If the claim be simple and comparatively small the stipulation is double the value of the claim. This stipulation takes the place of the vessel only for the purposes of that suit. (*The Haytien Republic*, 154, U. S., 127). The sureties cannot be made responsible beyond this. You will find a full discussion on this point and authorities quoted in *The Oregon*, 158 U. S., 205. But if the claim approximate the value of the vessel, or if there are others threatened, then the stipulation is for her value, ascertained by appraisement. The bond or stipulation must be approved by the judge, or if he be absent, by the collector of the port. The defendant in suits *in personam* having been served, or the claimant in suit *in rem* having come in and made claim, must file an answer setting up the defence. If, however, he thinks the libel imperfect, he may except in writing thereto, setting forth his objections. These are passed upon by the court, and if sustained an order is entered directing that the libel be amended in the particulars stated. If the answer be imperfect the libelant can file his exceptions in like manner. The pleadings are perfected in this way, and when complete the cause is at issue. This right to amend exists up to the filing of the decree. The cause is tried by a judge without a jury. Usually, and in every case in which it can be done, the testimony is taken before the judge. Conflict in testimony is met with in all courts. It is the rule in admiralty. Scarcely any case, certainly no case of importance is tried in that court, in which seamen are introduced as witnesses which does not abound in contradictory evidence. Under such circumstances it is all important that the judge who is to try the issues of fact should see and observe the appearance, demeanor and mode

of testifying on the part of witnesses. But if it be necessary the cause can be referred to an examiner appointed to take testimony and report it. In many cases the judge is at liberty to confer with one or more experienced navigators who can aid him in doubtful questions of navigation.

If the defendant in admiralty, technically known as respondent in libels *in personam* and as claimants in libels *in rem*, not only defends; that is, denies the claim of libelant, but also desires affirmative relief against him, he files his cross-libel, setting up his case precisely as an original libelant. To this the same right of exception lies as to the original libel, and the pleadings are perfected in the same way. When perfected the libel and cross-libel are treated as one case and are heard and tried together.

In speaking of proceedings *in rem* the word vessel has always been used as synonymous with *res*. *Res* means anything the subject of the suit. It may mean the cargo, or any part of the outfit of the vessel, or the whole vessel and her furniture, or as libels express it, "tackle, apparel, furniture and boats." The term "vessel" means anything that floats, from a raft of logs up to a man-of-war of the first-class. The decree is enforced by execution.

This division into suits *in personam* and suits *in rem* is always observed. Most frequently the suitor has his choice of remedy. Thus in a suit for supplies and repairs or other necessity the libelant may proceed against the ship *in rem*, or against the master or owner *in personam*. The master, an agent, contracting in his own name is responsible.

Mariners may proceed for their wages against the ship and her freight *in rem* and join the master *in personam*, or they may proced *in rem* alone against the ship and her freight, or they may proceed against the owner or the master alone *in personam*.

In suits for damages by collision, libelant may proceed

against the ship *in rem* and the master or against the ship alone *in rem*, or against the master or owner alone *in personam*.

Suits for assault and battery can be *in personam* only.

There is one matter appertaining to the jurisdiction and practice of courts of admiralty which requires special attention. And that is the liability of ship owners for the contracts and torts made or committed by the master and crew, or any of their agents. It must be always borne in mind that a grand principle of admiralty is the encouragement and protection of commerce and navigation. It is essential to the welfare of mankind that commercial intercourse between nations should exist. The intercourse is chiefly provided by shipping. So great is the expense, so great is the risk, so frequent are casualties to shipping, that men must be encouraged to risk their property and lives in marine adventures. Therefore, very early in maritime law, whilst the owner was rigidly held responsible for the acts of the master and crew, both in matters of contract and of tort in other courts, the maritime law modified the stringency of the common law and of the civil law and made owners of vessels liable only to the extent of their interest in the vessel, if personally they were free from blame. If they surrendered the vessel they were discharged from all further liability. This interest, of course, extends to the ship and her earnings which in maritime language is called freight. This rule is laid down by Grotius, Valin, Pardessus in the French Ordnances de la Marine of 1681, in fact all the authorities on maritime law. It has been imitated by statutes in England and France, and by the legislatures of Maine and Massachusetts. In 1851 Congress passed a statute on the subject, (9 Statutes at Large, 635). It is embodied in the Revised Statutes of the United States, section 4283, "The liability of the owner of any vessel for any embezzlement, loss or destruction by any person of any property, goods or merchandise, shipped or put on board of such vessel or for any loss or damage or in-

jury by collision or for any act, matter or thing, loss, damage, or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the interest of such owner in such vessel and her freight then pending.

The language of this section is clear and unmistakable The loss must occur without the privity—that is to say, without any connection with the cause thereof by any act of commission or omission and without the knowledge of the owner. The benefit of the act is given to the owner of any vessel; foreign vessels are protected by it. *The Scotland*, 105 U. S., 24. And all vessels navigating the high seas between ports in the same State. *Lord* v. *Goodall*, 102 U. S., 541. It only relieves the owners to the extent of their interest. It does not prevent an action against the master or crew individually for the wrong suffered. You will find able and full discussion of the law in *The Rebecca* Ware's Rep., 187, also reported in the Federal Cases, section 11619, and in *Norwich Co.* v. *Wright*, 13 Wallace, 104. The owners of a vessel can secure the limitation of liability provided in the act, whether the action be brought in a State court or in a Federal court, or before any action has been commenced against them in any court.

The practice in such matters has been established by the rules of the Supreme Court of the United States in admiralty. Rules 54, 55, 56 and Amended Rule 57. It would be tedious to recite these rules in full. In substance they provide that the relief must be sought in a district court of the United States, and nowhere else. The owner seeking the relief must file his libel in the district court in which proceedings have been begun against the ship or vessel to answer for the wrong complained of. If the vessel has not been libeled, but suit has been begun against the owners in any court—that is, any Federal court—then the libel must be filed in the district court of the district where that suit is brought. If no libel has been filed

against the ship, and no suit brought against the owners, and they only apprehend a suit or suit be threatened, (see *ex parte Slayton*, 105 U. S., 451) then the libel must be filed in the district court where the ship or vessel is. If she has been already libeled and sold, then her proceeds represent her in all respects under these rules.

The libel must state all the facts and circumstances upon which such limitation of liability is claimed, and must aver distinctly the absence of all fault on the part of the owner, and must state his interest in the vessel and the extent of it. It must pray the benefit of the act. The court thereupon orders an appraisement to be had under its direction by competent persons of the value of the vessel and of her freight and of the value of the interest therein of the libelant. And commands the libelant to pay that amount into court, or else to give bond with good surety for the payment of the amount, or, if the owners so elect, the court will order the transfer of the whole of their interest in the vessel and freight to a trustee, to be appointed by the court, who shall hold for whom it may concern. When this has been done the court issues a monition to all persons holding claims against such vessel for losses or wrongs, to come into court and make proof thereof, on a day named, which, however, must not be less than three months from the date of the publication of the notice. The court can also order such notice to be further given by mail or personal service. Then an injunction issues against any further proceedings whatever, anywhere, against suits againsts the owners for such loss or wrong. *Providence & N. Y. Steam Navigation Co.* v. *Hill M'nf g. Co.*, 109 U. S., 578. Any person claiming damages can answer the libel. The owner, by instituting these proceedings, does not lose the right of contesting his liability. An excellent case, full of the law on these points, is *in re Morrison*, 147 U. S., 15.

Judge Brown, of the Southern District of New York, held in *The Rosa*, 53 Federal Reports, 132, that where there is but a

single damage claim full relief under Revised Statutes, Section 4283 can be had by answer in a common law suit. Hence a proceeding in admiralty to limit liability and to restrain the prosecution of a pending action in a common law court, must show the existence or at least the probability of the existence of more than one damage claimant and the need of an apportionment in order to make the special proceeding in the District Court of the United States, under the section necessary and appropriate, or else it must show such a special case as does not admit of the full statutory remedy upon a single claim in the suit at common law. Failing such an averment the court of admiralty can refuse to entertain the proceeding or to enjoin the common law action in the State court on a single claim, even if it exceed the value of the vessel.

This is the law I think. An owner of a vessel is not obliged to go into the district court to protect himself under the united limited liability act in a suit on a single claim. He can use the act as a defence in the common law or in the admiralty court if he chooses, and it will be allowed him. *The Great Western*, 118 U. S., 520; *The Scotland*, 105 U. S., 24. But where there are several claimants, and it is clear that an apportionment *pro rata* among the claims of the value of the vessel will be necessary, then he must go into the district court.

One word more: Although a court of admiralty exercises its jurisdiction and administers its remedies upon the principles of equity it has none of the powers of a court of chancery. It cannot give equitable relief by way of injunction. It cannot compel the specific performance of a contract. It may set aside a sale made in admiralty proceedings in case of fraud or misconduct in the parties. It cannot take an account in proceedings, either *in personam* or *in rem* between part owners or their agents unless this arise incidentally in its own proceedings. It cannot review an award in a maritime cause made before action brought. Nor can it enforce an equitable

title in suits for possession nor enforce a trust. Henry's Admiralty, 310.

How far the statutes of limitation bind courts of admiralty is a question. They have no part in proceedings *in rem*; although the courts will adopt the principle that one may deprive himself of a right by laches or by unreasonable delay in enforcing it. (*The Key City*, 14 Wall., 653). There are many actions *in personam* in which the jurisdiction of admiralty and of the common law courts is concurrent; that is the party seeking relief could go into either court. It was contended that in such cases the party plaintiff was barred in admiralty if he would have been barred in the law court of the State in which the court was sitting. The Supreme Court although the question was made did not decide it. *Reed* v. *Insurance Co.*, 95 U. S., 23. In the lower courts generally the statute has been held not to bind the court. (See cases quoted in Henry's Admiralty, 314, Note 1).

THE COURT OF CLAIMS.

Necessarily in the numerous and multifarious operations of the General Government claims beyond number are constantly arising against it. As the sovereign is not suable without his consent, these claims were presented to Congress, and the calendar of private claims increased to such an extent that it could not be disposed of. As a relief to Congress the Court of Claims was established, first by the act of 1855, 24th February, 10 Statutes at Large, 612. This act and all amendments thereto were brought together in the Revised Statutes of the United States, sections 1059 *et seq.* Under their provisions a certain class of claims can now be recovered by suit against the United States in this court. Of these section 1068 gives to aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its

courts the privilege of prosecuting suits against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

In 1887, 24 Statutes at Large, 505, Congress passed an act fixing the jurisdiction of the Court of Claims as it now exists. First. All claims founded upon the Constitution of the United States, or of any law of Congress, except for pensions.

Or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States.

Or for damages, liquidated or unliquidated, in cases not sounding in tort.

In respect of which claims the party would be entitled to redress in a court of law, equity or admiralty, if the United States were suable.

Then comes an exception of claims growing out of the late civil war, known as war claims. Over these the court has no jurisdiction. Nor can it hear again any case heretofore, that is, before the passage of that act, (1887) rejected or reported upon adversely by any court, department or commission authorized to hear and determine the same.

Second. The court has jurisdiction in behalf of the United States of all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in that court.

Inasmuch as the United States is not suable but by its own consent, the Court of Claims has no other jurisdiction than that given by act of Congress. *United States* v. *Gleason*, 124 U. S., 255 ; *De Groot* v. *The United States*, 5 Wall., 419.

It has no jurisdiction founded on torts. *Gibbons* v. *The United States*, 8 Wall., 269. If land be taken for public purposes and the owner resists, he cannot sue for compensation in the Court of Claims ; if he does not resist he may sue. *Ex parte Schillenger*, 155 U. S., 165.

Thus the court has no jurisdiction to try cases growing out of the appropriation of property by the army or navy not authorized by contract.

A good illustration of this is found in *Pugh* v. *The United States*, 13 Wallace, 633. In that case a suit was brought against the United States in this court for unlawful appropriation of property, and among the items was rent of a plantation which had been taken possession of during the war by a treasury agent, and by him leased to third parties. This was done under act of Congress relating to captured and abandoned property. The court held that it had no jurisdiction to consider the other items of the account, which were for property unlawfully taken and destroyed. And that the leasing of the plantation was but an incident to the unlawful appropriation and spoliation of the plantation; and, therefore, though set up as a contract, really sounded in tort, and, therefore, was not within its jurisdiction.

The court has no jurisdiction over a cause of action against the United States, which grows out of or is dependent on a treaty stipulation. (*Great Western Insurance Co.* v. *The United States*, 112 U. S., 193; *Paulson* v. *The United States*, 112 U. S., 193.) For example, the court has no jurisdiction of a claim against the United States for money received from Mexico under the treaty of 4th July, 1868, it being a claim growing out of and founded on a treaty. (*Alling* v. *The United States*, 114 U. S., 562). But there must be direct connection between a treaty and the claim against the United States in order to exclude it from the jurisdiction of this court. (*United States* v. *Wild*, 127 U. S., 51).

The United States can make use of any patent it may deem necessary for public purposes, in the exercise of its right of eminent domain. You will find this fully discussed in a case of *Dashiell* v. *Grosvenor*, 66 Fed. Rep., 334, a case in the Circuit Court of Appeals of this circuit. Compensation for such

use can be obtained in the court of claims. *United States* v. *Palmer*, 128 U. S., 262.

No claim can be entertained by the court not brought within six years after the accrual of the right for which the claim is made. There is no limit to the jurisdiction of the court of claims as to the amount. The Circuit Court of the United States has concurrent jurisdiction with it as to claims between $1,000 and $10,000. The district court has concurrent jurisdiction on claims below $1,000.

In addition to jurisdiction of claims against the United States, the act of Congress gives a remedy to persons indebted to the United States. Any one indebted to the United States as an officer or agent thereof or under any contract therewith, or who is the guarantee, surety or personal representative of any officer, agent, or contractor so indebted to the United States, who has applied to the proper department of the government, requesting that the account of such officer, agent, or contractor may be adjusted and settled, and has not been able to obtain such adjustment within three years from the date of his application, can file his petition in the court of claims, setting forth all these facts, and that no suit has been brought on such indebtedness. Thereupon the court will entertain the petition, and after due notice to the head of the department and to the Attorney-General of the United States, will hear the cause and adjust the claim. If the petitioner pay the sum fixed in such cause, he will be discharged. If he does not so pay the sum found due, suit can be brought on the judgment by the United States against all parties indebted at any time within three years from rendition of the judgment. After that date it will be barred. So also if any claim be presented to the head of a department and on examination it be found to present controverted questions of fact or law, the head of such department, with the consent of the claimant, may submit these questions to the court of

claims for final adjudication. Judgment for costs can be against the United States, for all costs but for attorneys.

The pleadings in this court are by petition, and defences thereto, by way of answer. The cause is heard by express provision of the act without a jury—by the court alone. This provision of the act is not affected by the clause in the Constitution securing the right of trial by jury in a case at common law. The right to sue the government depends entirely upon the statute, and has no existence at common law. The decision is subject to review by the Supreme Court of the United States, and as far as the reported cases show, they go up by appeal and not by writ of error. Six months is allowed to the attorney-general of the United States to determine whether he will appeal or not. The petition, in fact, all the pleadings with regard to their sufficiency and the incidents of trial, rules of evidence and the like, are governed by the rules prevailing in the other courts.

The final result of each case, if adverse to the government, must be reported to Congress by the attorney-general at the beginning of each session, so that Congress may take such action thereon as may be advised.

The sessions of the court are all held at the seat of government in Washington. Its decisions are officially reported as Court of Claims Reports, and are frequently quoted as persuasive, but not as conclusive, authority.

TERRITORIAL COURTS.

These are not, strictly speaking, courts of the United States within the meaning of the Constitution. (*Good* v. *Martin*, 95 U. S., at page 98; *Reynolds* v. *The United States*, 98 U. S., at page 154.)

They are not constitutional, but legislative courts, combining the powers of both Federal and State jurisdiction. The distinction between Federal and State jurisdiction does not exist

in them, either as to persons or as to subjects committed to their cognizance. *Forsythe* v. *The United States*, 9 Howard, 235. One distinction is noteworthy. Admiralty jurisdiction in the States can only be exercised in the courts established under the Article III. of the Constitution, but Congress can bestow admiralty jurisdiction on the Territorial courts, notably the Territory of Florida and the Territory of Washington. *American Ins. Co.* v. *Canter*, 1 Peters, 511; *City of Panama* v. *Phelps*, 101 U. S., 453.

Another distinction exists between these Territorial courts and the Circuit and District Courts of the United States. As has been seen, law and equity are kept totally distinct in the United States courts. The procedure in them is entirely different.

Practice, pleadings, form and mode of procedure in the Territorial courts are governed entirely by the acts of the Territorial Legislature, and causes of action and forms of procedure can be blended by these acts. (*Hirshfield* v. *Toombs*, 18 Wallace, 648.) Although this is so, the essential difference existing between the principles governing law and equity are not changed. The forms of action may be the same, but law cases must be passed upon by a jury, unless the jury be expressly waived. Equity cases can be passed upon by the court alone. *Basy* v. *Gallagher*, 20 Wallace, 670.

As the Territories of the United States are all organized in order to prepare them for exercising the rights of Statehood when Congress shall so order, the Territorial courts necessarily are not of a permanent character. The judges for these courts, therefore, do not hold during good behavior, as judges in Constitutional Courts of the United States, but are appointed for four years and until their successors are appointed. Though technically not removable at the pleasure of the President, any of them can be suspended by him, and if the Senate confirms another person as such judge, the suspension is permanent. *Mc-*

Allister v. *The United States*, 141 U. S., 174; *Wingard* v. *The United States*, 141 U. S., 201.

The Supreme Court of every Territory consists of a Chief Justice and two associate justices, any two of whom are a quorum and can hear and decide cases and transact business. Each Territory is divided into three districts, over each of which a justice of the Supreme Court presides. The courts exercise chancery as well as common law jurisdiction. The Supreme Court appoints its own clerk, and each district court its clerk. Writs of error and appeals lie from their decision to the Supreme Court of the United States, and to the circuit courts of appeal of the circuit in which they may be respectively, under the same rules and regulations as govern appeals, and writs of error from the Circuit Courts of the United States.

The courts have power to issue all writs necessary to preserve, protect and enforce their jurisdiction.

We have thus gone over the whole subject of the Federal courts, their jurisdiction and procedure. The effort has been to set out the matter as plainly and distinctly as possibly, without ornamentation of any kind. We are fellow students in the law. In going over that branch of it which pertains to the Federal courts, I have acted the part of an older brother in the profession, and have pointed out to you some of the principles and facts which deserve your attention. Of necessity the examination and discussion of these matters have been brief, and in great measure superficial. To do justice to them would require a volume. Your patience and time would both be exhausted.

All that could be done was to put you on the inquiry, to open the paths by which more thorough knowledge of the subject can be found. No proposition has been stated which cannot be sustained by decisions of the Supreme Court of the United States. These are noted in the text and have in every case been reviewed and verified.

You aspire to be members of a great profession. The Bar has exercised great influence in the progress of Anglo Saxon civilization. It has made its impress on the civilization of the continent of Europe. In our own country it has done more toward the adoption and construction of the Constitution, to the preservation of the conservative forces of our government, to the development and security of our prosperity, than any other of the numerous influences at work.

To the successful pursuit of the profession, industry, perseverance, patience and character are essentially necessary.

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